9/case No. 409

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 409 REPORT OF CASE DECISIONS December 10, 1986

UNFAIR LABOR PRACTICE CASE

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Federal Labor Relations Authority

24 FLRA No. 40

Defense Logistics Agency, Council of AFGE Locals and DOD, Defense Logistics Agency, Case No. 0-NG-838 (Decided December 5, 1986)

SUBJECT MATTER INDEX ENTRIES

- APPOINTMENTS, SELECTION FOR
  - VACANCIES
    - REQUIREMENT TO FILLED
- APPROPRIATE ARRANGEMENTS
  - POSITION, FILLING OF
- ASSIGN EMPLOYEE
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  - SUPERVISION, REQUIREMENT THAT SUPERVISORS BE AGENCY EMPLOYEES
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- DISCIPLINE EMPLOYEES, RESERVED MANAGEMENT RIGHT [7106(a)(2)(A)]
  - OFF-DUTY CONDUCT
- EMPLOYEE [7103(a)(2)]
  - ENLISTED MILITARY PERSONNEL NOT "OFFICERS" UNDER 10 U.S.C. 101
  - MILITARY PERSONNEL NOT "OFFICERS" OR "EMPLOYEES"
- FEDERAL PERSONNEL MANUAL
  - CHAPTER 335, SUBCHAPTER 1-4, REQUIREMENT 4
  - LETTER 300-8 [DECEMBER 12, 1967]
  - LETTER 300-12 [AUGUST 20, 1968]
- GOVERNMENT-WIDE RULES OR REGULATIONS
  - FEDERAL PERSONNEL MANUAL
    - FPM CHAPTER 335, SUBCHAPTER 1-4, REQUIREMENT 4
- HIRE, RESERVED MANAGEMENT RIGHT [7106(a)(2)(A)]
  - POSITIONS
    - REQUIREMENT THAT VACANT POSITIONS BE FILLED
- HOUSE REPORTS
  - H.R. REP. NO. 95-1403, 95TH CONG., 2ND SESS. (1978)

STATUTE

7103(a)(10)
7105(a)(2)(E)
7106(a)(2)(A), (B) & (C)
7106(b)(2) and (3)
7114(c)
7117(a)(1)

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- MANAGEMENT RIGHTS: GENERALLY,
  - GOVERNMENT-WIDE RULES AND REGULATIONS
    - INCORPORATING EXISTING RESTRICTIONS INTO CONTRACT
- PERSONNEL, DETERMINATION OF, RESERVED MANAGEMENT RIGHT
  - SUPERVISION, REQUIRING SUPERVISORS TO BE AGENCY EMPLOYEES
- POSITION, FILLING OF
  - APPROPRIATE SOURCE
    - FPM CHAPTER 335, SUBCHAPTER 1-4, REQUIREMENT 4
  - VACANCIES
    - REQUIREMENT THAT VACANCIES BE FILLED
- PROMOTION
  - PERFORMING OR ASSIGNING DUTIES OF A HIGHER GRADED POSITION
    - COMPETITIVE PROCEDURES IN COLLECTIVE BARGAINING AGREEMENT
- STANDARDS OF CONDUCT, EMPLOYEE AND MANAGEMENT OFFICIALS
  - OPM REGULATIONS
    - MINIMUM STANDARDS [5 C.F.R. 735.101]
    - REQUIREMENT THAT AGENCIES ESTABLISH STANDARDS
- SUPERVISOR [7103(a)(10]
  - SUPERVISION, REQUIRING SUPERVISORS TO BE AGENCY EMPLOYEES
    - 7103(a)(10) NOT APPLICABLE TO DETERMINATIONS OF AGENCY
- UNITED STATES CODE
  - 5 U.S.C. 2105
  - 5 U.S.C. 2302(b)(10)
  - 10 U.S.C. 101

DIGEST NOTES

A provision is nonnegotiable that would limit the agency's right to take disciplinary action against bargaining unit employees for off duty conduct to only those circumstances where the agency can demonstrate that there is a direct relationship between the conduct and the employee's job performance. This limitation is inconsistent with management's right to discipline under section 7106(a)(2)(A) and OPM regulations. Under OPM regulations, agencies must issue regulations prescribing standards of conduct for their employees. 5 C.F.R. 735.101 (1986). Violations of those agency standards of conduct are subject to remedial action including disciplinary action. 5 C.F.R. 735.107. The OPM regulations establish minimum requirements which agencies must include in their regulations governing conduct of employees. 5 C.F.R. 735.201. Among other things, each agency's regulations must require that (1) employees pay "each just financial obligation in a proper and timely manner" and (2) they "shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government." 5 C.F.R. 735.207 and 735.209. (provision 1)

A provision is negotiable that would require the agency to use competitive procedures set forth in the Merit Promotion Article of the parties' agreement in making assignments of, employees to higher level duties and responsibilities on a continuous basis. Procedures for selecting employees for assignment from among those judged by management to be qualified constitute negotiable procedures under section 7106(b)(2) and do not interfere with management's right to assign employees or to assign work under section 7106(a)(2)(A) and (B). Where the agency determines that qualifications which it had previously established are no longer suitable to a position, it would not be prevented by this provision from establishing different ones. (provision 2)

A provision is nonnegotiable that would require the agency to fill certain vacant positions, even if it did not wish to fill the positions, with incumbents of old positions that were abolished as a result of a reorganization. The Authority has held that similar proposals interfere with an agency's rights to hire and assign employees under section 7106(a)(2)(A) and to make selections under section 7106(a)(2)(C). Such proposals are not appropriate arrangements within the meaning of section 7106(b)(3). Furthermore, even assuming that the proposal did not constitute an excessive interference with management's rights, it is nonnegotiable under section 7117(a)(1) because it is inconsistent with a Government-wide regulation. Requirement 4 of Subchapter 1-4, Chapter 335 of the FPM permits agencies to fill positions by making selections from any appropriate source. By limiting the agency to the specified sources for filling the position involved, it contravenes that regulation. (provision 3)

A provision is nonnegotiable that would prohibit bargaining unit employees from being supervised by persons who are not "officers" or "employees" of the Federal Government. The provision interferes with the agency's right to assign work under section 7106(a)(2)(B) by restricting the agency's ability to require employees to carry out tasks assigned by individuals other than the specified individuals. Also, the provision interferes with management's right under 7106(a)(2)(B) to determine the personnel who would conduct agency operations. Under the provision the agency would be precluded from having contractor and some, if not all, military personnel perform supervisory functions of the bargaining unit. Military personnel are neither "officers" nor "employees" within the meaning of 5 U.S.C. sections 2105 and 7103(a)(2). Enlisted military personnel are not "officers" within the meaning of 10 U.S.C. section 101. The definition of "employee" in the Statute relied upon by the union as supporting the provision is misplaced. Section 7103(a)(10) of the Statute which defines "employee", simply enumerates duties and responsibilities which would identify individuals as supervisors for purposes of including or excluding them from bargaining units. Assuming that FPM Letters 300-8 and 300-12 are Government-wide rules as alleged by the

union, the union correctly interprets them as effectively prohibiting agencies from allowing contractor personnel to supervise Federal employees. However, this does not render the provision negotiable. Contract restrictions on management rights which are found in Government-wide rules and regulations imposes an independent contractual limitation upon management's discretion with respect to those rights. Incorporation of such limitations in the contract would require management to continue to comply with the restrictions during the term of the agreement regardless of whether the particular restrictions were subsequently removed for the rules or regulations involved. [provision 4]

Federal Labor Relations Authority

24 FLRA No. 41

AFGE, Local 1897 and Dep't of the Air Force, Eglin Air Force Base, Florida, Case No. 0-NG-757 (Decided December 9, 1986)

SUBJECT MATTER INDEX ENTRIES

- BUDGET, MANAGEMENT RIGHTS
  - FRINGE BENEFITS
- COMPENSATION SYSTEM
  - WAGE / SALARY RATES
    - LEGISLATIVE HISTORY AND ANALYSIS
- CONDITIONS OF EMPLOYMENT
  - NON-BARGAINING UNIT EMPLOYEES
- COMPELLING NEED [7117(a)(2)]
  - NO CONFLICT BETWEEN AGENCY REGULATION AND PROPOSAL
- DUTY TO BARGAIN
  - ANALYSIS OF THE LEGISLATIVE HISTORY
- EMPLOYEE [7103(a)(2)]
  - NONAPPROPRIATED FUND INSTRUMENTALITY EMPLOYEES
- EXECUTIVE ORDERS
  - E.O. 10988
  - E.O. 11491
    - 11(a)
- FRINGE BENEFITS
  - MEDICAL INSURANCE
    - PERCENTAGE OF TOTAL PREMIUM COST
- GOVERNMENT-WIDE RULES OR REGULATIONS
  - SCOPE OF COLLECTIVE BARGAINING
    - LEGISLATIVE HISTORY AND ANALYSIS OF 7117(a) AND 7103(a)(14)(C)
- NON-APPROPRIATED FUND AGENCIES
  - COMPENSATION OF EMPLOYEES
- HOUSE REPORTS
  - H.R. REP. NO. 95-1403, 95TH CONG., 2ND SESS. (1978)
- UNITED STATES CODE
  - 5 U.S.C. 2105
  - 5 U.S.C. 5341
  - 5 U.S.C. 5373
  - 5 U.S.C. 7135
  - 5 U.S.C. CHAPTER 53

STATUTE

- 7103(a)(14)(A), (B) & (C)
- 7105(a)(2)(D) and (E)
- 7106(a)(1)
- 7117(a) and (a)(2)
- 7135

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

5 U.S.C. CHAPTER 55
5 U.S.C. CHAPTER 73, SUBCHAPTER III
5 U.S.C. CHAPTER 83
5 U.S.C. CHAPTER 87
5 U.S.C. CHAPTER 89
29 U.S.C. 151 ET SEQ. [NATIONAL LABOR RELATIONS ACT]
39 U.S.C. 101-5605 [1976 & SUPP. V 1981] [POSTAL REORGAN. ACT]
DEFENSE OVERSEAS TEACHERS PAY AND PERSONNEL PRACTICES ACT
MERCHANT MARINE ACT
PREVAILING RATE ACT OF 1972 [PUB. L. NO. 92-392]

DIGEST NOTES

A proposal is negotiable that would require the agency to pay up to 75 percent of the premium cost of employee health insurance for employees of a nonappropriated fund instrumentality. Although wages and fringe benefits of most Federal employees are established by law, the employees of the nonappropriated fund instrumentality in this case are not covered by laws relating to health insurance or retirement. The Statute provides that the scope of the duty to bargain with an exclusive representative of its employees extends to "conditions of employment," which term is further defined as "personnel policies, practices and matters affecting working conditions." Section 7103(a)(12) and (14). Excluded from the definition of "conditions of employment" are, among other things, matters specifically provided for by Federal statute. The Statute also excludes from the scope of the duty to bargain proposals which concern conditions of employment but which are inconsistent with law and regulation. Section 7117(a). Thus under the Statute a proposed matter which is a condition of employment and is not inconsistent with applicable law or regulation is within the duty to bargain.

The Authority analyzed the legislative history of sections 7117(a) and 7103(a)(14)(C), including relevant experience under Executive Order 11491, and concluded that the proposal is consistent with the effect of the legislative history of those sections. In summary, the Authority concluded that Congress intended the basic scope of the duty to bargain to be at least the same under the Statute as it was under the Executive Order. Under both, the duty to bargain explicitly extends to personnel policies, practices, and matters affecting the working conditions of bargaining unit employees. Bargaining over proposals inconsistent with applicable controlling law or regulation, however, is not permitted.

Contrary to the agency, the Authority held that the proposal does not determine the conditions of employment of nonunit employees. The agency had argued that since the nonappropriated fund instrumentality had a finite amounts of money, the proposal could affect employees outside the bargaining unit by reducing the size of the budget available to provide benefits to those non-unit employee by an amount equal to that amount the proposal increased benefits for bargaining unit employees. The Authority affirmed that proposals which directly determine, that is prescribe, the conditions of employment of nonunit employees are outside the duty to bargain. However, otherwise negotiable proposals which directly determine conditions of employment of bargaining unit employees are not rendered nonnegotiable simply because they affect conditions of employment outside of the bargaining unit to a limited degree or in an indirect way.

The proposal did not directly interfere with management's right to determine its budget under section 7106(a)(1). The proposal establishes a percentage of the total premium cost to be absorbed by the agency. What that percentage means in terms of the amount to be budgeted depends on factors not covered by the proposal, but within the agency's control, such as total premium costs and number of employee subject to the health insurance program. Furthermore, the agency did not demonstrate that the proposal would result in significant and unavoidable costs which are not offset by compensating benefits.

Finally, the agency argued that a compelling need existed for a uniform, centrally managed health insurance program. The Authority differentiated this proposal from proposals cited by the agency that were decided under Executive Order 11491 by the Federal Labor Relations Council. The Authority concluded that the agency did not demonstrate how the proposal conflicted with the agency regulation for which a compelling need was alleged. (majority opinion)

In a dissenting opinion, one Authority Member stated that he finds a compelling need exists for the cited agency regulation in that it is essential to the mission and function of the agency based on the need for a comprehensive, uniform system of compensation for employees who throughout the world perform the same or substantially similar work. He further explained that absent evidence of express Congressional intent to make compensation matters a subject of collective bargaining, he would not imply such an intent, and hence finds such proposals not to be negotiable as a general proposition. (dissenting opinion)

Federal Labor Relations Authority

24 FLRA No. 42

HHS, SSA and AFGE, Local 1760,
Case No. 2-CA-40211 (Decided
December 9, 1986)

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(5)
NO MORE THAN A DE MINIMIS CHANGE
POSITION, FILLING OF
DUTY TO BARGAIN
CONDITIONS OF EMPLOYMENT, CHANGES IN
STANDARDS GOVERNING THE CHANGE IS MORE THAN DE MINIMIS
ESTABLISHED PROCEDURES FOR ANALOGOUS CHANGES
NATURE OF THE CHANGE
NUMBER OF BARGAINING UNIT EMPLOYEES AFFECTED
SIZE OF BARGAINING UNIT NO LONGER CONTROLLING
TEMPORARY, RECURRING OR PERMANENT NATURE OF THE CHANGE
STANDARDS MODIFIED
CONDITIONS OF EMPLOYMENT 7103(a)(14)
DE MINIMIS CHANGE
NOT MORE THAN A DE MINIMIS CHANGE
REASSIGNMENT OF EMPLOYEE
POSITION, FILLING OF
REASSIGNMENT
CONDITIONS OF EMPLOYMENT
NOT MORE THAN A DE MINIMIS CHANGE

STATUTE

7101
7105(a)(1)
7116(a)(1), (5) and (8)
7118

DIGEST NOTES

The agency did not have an obligation to bargain over impact and implementation involved in the reassignment of a clerk. Consequently, the agency did not violate section 7116(a)(1) and (5) for refusing to bargain. In order for there to be an obligation to bargain over procedures and appropriate arrangements that management will follow when exercising one of its reserved rights, the effect of management's actions must be more than *de minimis* on conditions of employment. The Authority reassessed and modified its standards used to determine whether or not a particular agency action has more than a *de minimis*

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impact on conditions of employment. The Authority stated that in order to determine whether a change in conditions of employment requires bargaining, the pertinent facts and circumstances presented in each case will be carefully examined. In examining the record, the Authority will place principal emphasis on such general area of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involve.

The number of employees involved will not be a controlling factor in determining whether a particular change has more than a de minimis change on conditions of employment. But when applied, it will be applied primarily to expand rather than limit the number of situations where bargaining will be required.

Applying the modified standards to this case, the Authority concluded that the agency did not have an obligation to bargain over procedures and appropriate arrangements involved in the reassignment of the clerk. While there was some change in the employee's conditions of employment as a result of her reassignment from the clerical position in one organizational unit back to the clerical position she previously held in another section, review of the relevant facts and circumstances established that the change did not give rise to a bargaining obligation. The nature of the change was limited, i.e., the reassignment of the employee from a position she had held for less than three months back to the position she had previously held. The employee's reassignment involved no loss in pay or grade, nor did it involve a change in her hours. Although the new position that was created involved some changes in duties and tasks, the duties of the old and new positions are substantially similar. Moreover, the anticipated effect on the remaining clerks due to the employee's reassignment is minimal since the reassignment was directed as a result of a decrease in workload.

Federal Labor Relations Authority

24 FLRA No. 43

AFGE, Local 17 and VA Central Office (Kaplan, Arbitrator), Case No. 0-AR-1154 (Decided December 10, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
APPOINTMENTS, SELECTION FOR	7106(a)(2)(C)
MAN.'S RIGHT ABRIDGED BY ARB. AWARD	7122(a)
DIRECT CONNECTION BETWEEN IMPROPER ACTION & FAILURE TO SELECT	
PROMOTIONS	
CAREER LADDER PROMOTION NOT AN "APPOINTMENT" [7106(a)(2)(C)]	
ARBITRATION AWARDS, REMEDIES ORDERED BY ARBITRATORS	
BACKPAY	
PROMOTION	
RETROACTIVE PERMANENT PROMOTION WITH BACKPAY	
ARBITRATION AWARDS, REVIEW OF, EXCEPTIONS ASSERTED IN APPEAL	
AWARD CONTRARY TO APPLICABLE LAW	
5 U.S.C. 5596 [BACK PAY ACT]	
AWARD CONTRARY TO THE FSLMR STATUTE	
7106(a)(2)(C)	
ARBITRATION AWARDS, REVIEW OF, NO BASIS FOR REVIEW	
DISAGREEMENT WITH ARB'S INTERPRETATION/APPLICATION OF AGREEMENT	
BACKPAY	
CRITERIA FOR BACKPAY AND RETROACTIVE PROMOTIONS	
UNWARRANTED ACTION DIRECTLY RESULTED IN REDUCTION IN PAY	
RETROACTIVE PROMOTION	
PROMOTION	
CAREER-LADDER PROMOTION	
NOT A "SELECTION FOR APPOINTMENT" UNDER 7106(a)(2)(C)	
UNITED STATES CODE	
5 U.S.C. 5596 [BACK PAY ACT]	

DIGEST NOTES

The issue in this case was whether the agency violated the parties' collective bargaining agreement by failing to give the grievant a career ladder promotion. The agreement requirement over which the parties disagreed was whether or not the "selectee demonstrated the ability to perform the duties of the next higher grade to the satisfaction of the supervisor." The arbitrator

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found that the immediate supervisor's testimony that the grievant demonstrated that she could satisfactorily performed the GS-11 duties outweighed the claim by higher management that she had not performed satisfactorily. As his award, the arbitrator sustained the grievance and awarded a retroactive promotion with backpay.

As one of its exceptions, the agency contended that the award violated management's right to select under section 7106(a)(2)(C) because it failed to make the required connection between improper agency action and the failure of the grievant to be promoted. The Authority has previously held that management's right to make selections under section 7106(a)(2)(C) may be constrained and an agency ordered to select a particular employee for promotion only if the arbitrator finds that the employee was affected by an improper agency action that directly resulted in the failure of the employee to be promoted. The Authority has also held that a decision to promote an employee to the next grade in a career ladder position does not constitute a selection for appointment within the meaning of 7106(a)(2)(C) but is merely a "ministerial act" implementing a prior decision to select an employee for appointment. The Authority held that this exception provided no basis for finding the award deficient. The Arbitrator interpreted the agreement and found that the immediate supervisor was the proper person to evaluate the grievant's ability to perform at a higher grade. He concluded that the requirements for promotion were met. Accordingly, the agency's exception merely constituted disagreement with the arbitrator's interpretation and application of the parties' agreement which provides no basis for finding an award deficient.

In its second exception, the agency contended that the award was contrary to the Back Pay Act, 5 U.S.C. 5596. The Authority held that the this exception failed to show that the award was contrary to the Back Pay Act. Having selected the grievant for a career ladder position, the agency was obligated, under the provisions of the parties' agreement, to promote her to the next grade when she demonstrated the "ability to perform the duties of the next higher grade to the satisfaction of the supervisor." The requirements of the Back Pay Act for an award of a retroactive promotion with backpay was met, i.e. that a determination be made that the grievant suffered an unjustified or unwarranted personnel action which directly resulted in the denial of a promotion.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE LOGISTICS AGENCY
COUNCIL OF AFGE LOCALS
AFL-CIO

Union

and

Case No. O-NG-838

DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of four provisions[1] of a contract which were agreed to locally but disapproved during review of the agreement by the Agency head pursuant to section 7114(c) of the Statute. As set forth below, we find Provisions 1, 3 and 4 nonnegotiable and Provision 2 negotiable.

II. Provision 1

ARTICLE 4
EMPLOYEE RIGHTS AND RESPONSIBILITIES

SECTION 8. The private life of an employee is his/her own affair.

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[1] The Union has withdrawn its petition as to three other provisions. They will not be considered further in this decision.

A. Positions of the Parties

In its petition the Union states that this, and the other provisions, are very clear and self-explanatory. The Agency argues that this provision conflicts with its right under section 7106(a)(2)(A) to discipline employees for violations of standards of conduct such as nonpayment of debts, which arguably involve their private lives. In response, the Union states that the provision would not prevent the Agency from taking disciplinary action as long as there is a nexus between the off duty conduct for which the employee is being disciplined and the employee's job performance. It argues in this connection that standards of conduct and actions taken under them must not discriminate against employees based on off-duty conduct when there is no relationship to job performance in order to be consistent with 5 USC § 2302(b)(10).

B. Analysis and Conclusions

Based on the record in this case we find that this provision is intended to limit the Agency's right to take disciplinary action against bargaining unit employees for off duty conduct to only those circumstances where the Agency can demonstrate that there is a direct relationship between the conduct and the employee's job performance. This limitation is inconsistent with Office of Personnel Management (OPM) regulations and with management's right to discipline.

1. Government-wide Rule or Regulation

Under regulations issued by the OPM, agencies must issue regulations prescribing standards of conduct for their employees. 5 CFR § 735.101 (1986). Violations of those agency standards of conduct are subject to remedial action including disciplinary action. 5 CFR § 735.107. The OPM regulations establish minimum requirements which agencies must include in their regulations governing conduct of employees. 5 CFR § 735.201. Among other things, each agency's regulations must require that (1) employees pay "each just financial obligation in a proper and timely manner" and (2) they "shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government." 5 CFR §§ 735.207 and 735.209. In our view, these required standards of conduct apply to the "private life of an employee" which Provision 1 states is the employee's "own affair." Thus, we find Provision 1 and the prescribed standards are in conflict. This finding is supported by our perception of the intended meaning of the provision, already noted. That is, the provision would limit the Agency's ability to discipline only to where it could demonstrate a direct relationship between conduct and job performance. No such limitation is apparent from the face of the OPM regulation and the Union has not shown that they were meant to be applied in this restricted manner.

We conclude, therefore, that the provision would prohibit the Agency from complying with 5 CFR Part 735 which, as already stated, requires the Agency to prescribe and enforce standards of conduct which apply to an employee's private life. The regulations set forth at 5 CFR Part 735 apply generally to, and are binding on, Federal agencies. 5 CFR §§ 735.101, 735.102 and 735.201. They are Government-wide rules and regulations within the meaning of the Statute. *See* *National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 FLRA 748, 751-55 (1980). Because Provision 1 is inconsistent with a [illegible]ernment-wide rule or regulation, it is not within the d[illegible] to bargain.[2] This case is distinguishable from *National Treasury Employees Union and Internal Revenue Service*, 6 FLRA 522 (1981) (Proposal VIII) in which the Authority noted that agencies retain some discretion in formulating the specific language of standards of conduct. In finding various rules of conduct to be negotiable in that case the Authority noted that the agency had not established that the proposed language conflicted with law or the various provisions of 5 CFR Part 735 which serve as the basis for the formulation of agency standards.

2. Right to Discipline

The Agency has the right under the Statute to take disciplinary action "in accordance with applicable law." Insofar as the provision seeks to further limit the Agency's ability to institute disciplinary action based on violations of standards of conduct, it infringes upon the Agency's right under 7106(a)(2)(A) to take disciplinary actions. The record indicates that the Union does not intend the provision simply to require that disciplinary actions relating to off-duty conduct be carried out in accordance with existing law and applicable regulations. Rather, the Union is attempting to establish by contract that a particular relationship between off-duty conduct and the employee's job performance must exist in order to sustain a disciplinary action.[3] If the provision simply required the Agency to adhere to whatever applicable laws and regulations were in existence at the time in taking disciplinary action against employees for off-duty conduct, it would, of course, be negotiable. See, for example, American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service, 11 FLRA 672 (1983) (Proposal 4). Based on the record, however, we must conclude that the provision would place substantive limitations on the Agency's reserved discretion to take disciplinary actions based an off-duty conduct, "in accordance with applicable laws."

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[2] In finding that this provision is inconsistent with OPM regulations governing standards of conduct, we express no opinion as to whether portions of these standards may be in conflict with 5 CFR § 2302(b)(10) as the Union suggests. The Statute does not authorize us to rule on the legality or validity of OPM regulations. *American Federation of Government Employees, AFL-CIO, National Council of Grain Inspection Locals v. Federal Labor Relations Authority*, No. 85-4541 (5th Cir. July 21, 1986).

III. Provision 2

ARTICLE 13

MERIT PROMOTION

Section 2. Policy

E. Higher level duties and responsibilities will not be assigned to employees on a continuing basis when such assignment is not in accordance with the provisions and intent of this Article since such assignments create the impression of favoritism and pre-selection and impair employee confidence in the integrity of the promotion program.

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[3] We note that limiting discipline for off-duty conduct to off-duty conduct which affects job performance arguably is contrary to existing law. See, for example, Allred v. Department of Health and Human Services, 786 F.2d 1128, 1130-32 (Fed. Cir. 1986), in which the Court indicated that a relationship between off-duty conduct and an employee's job may be presumed and may be based on factors other than an employee's job performance.

A. Positions of the Parties

The Agency argues that this provision interferes with its right under section 7106(a)(2)(A) and (B) to assign employees and to assign work. It asserts that both of these rights reserve to the Agency the discretion to determine the qualifications necessary to perform the work involved but that this provision would prevent it from making assignments to employees who are not qualified either under OPM or Agency qualifications standards. The Union argues that this provision would not prevent the Agency from exercising its reserved discretion. Rather, it would establish a procedure to be followed in assigning higher level duties to employees on a continuing basis.

B. Analysis and Conclusions

The provision would effectively require the Agency to use competitive procedures set forth in the Merit Promotion Article of the contract in making assignments of, and to, employees involving higher level duties and responsibilities on a continuous basis.

While, as the Agency points out, its rights under section 7106(a)(2)(A) and (B) to assign employees and to assign work encompass the discretion to establish the qualifications necessary to perform the duties involved, it claims but has not established that the provision would conflict with that discretion. The Authority has consistently found that proposals which establish procedures for selecting employees for assignment from among those judged _by management_ to be qualified constitute negotiable procedures under section 7106(b)(2) and do not interfere with an agency's rights to assign employees and to assign work. _See_, _for example_, _Laborers International Union of North America, AFL-CIO, Local 1276 and Veterans Administration, National Cemetery Office, San Francisco, California_, 9 FLRA 703 (1982).

The Agency asserts that this provision would bind it to observe OPM and agency qualification standards, in derogation of its reserved discretion to determinate the qualifications necessary to perform particular duties. It does not support this assertion by showing how the competitive procedures set forth, or incorporated, in the contract itself would create such a requirement independent of governing regulations.[4] Such a result is not apparent from a reading of the Merit Promotion Article. As to Agency standards, the competitive procedures specified in the contract include procedures for establishing rating plans which include identification of the knowledge, skills and abilities (KSA's) necessary to successful performance of a particular job. However, these contract procedures do not dictate what the substance of those KSA's will be. Rather, the Agency retains control over the determination of their substance.

Thus, we have no basis in the record for concluding that Provision 2 would infringe on the Agency's discretion to determine the qualifications for positions. Additionally, the record does not establish that, where the Agency determines that qualifications which it had previously established are no longer suitable to a position, it would be prevented by this provision from establishing different ones. Based on the foregoing we conclude that Provision 2 only requires competitive procedures to be used under the specified circumstances in assigning employees to work and positions, and that it does not in any way interfere with management's rights. It is a negotiable procedure under section 7106(b)(2).

IV. Provision 3

ARTICLE 30

REORGANIZATION

SECTION 3. SUCCESSOR POSITIONS

When a position in an organization is abolished as a result of a reorganization and an identical position is to be established at the same grade within 30 days in a new organization within the PLFA, the incumbent of the old position will be offered the newly established position, unless such offer would be in conflict with the assignment rights of another employee.

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[4] We are aware that under FPM Chapter 335, Subchapter 1-4, agencies are required to observe minimum qualification standards prescribed by OPM in effecting certain promotion and placement actions. However, the Agency does not state how, if at all, the contract language involved establishes an independent requirement that these be observed.

A. Positions of the Parties

The Agency contends that this provision violates the Agency's rights to assign employees and to layoff, retain, remove or reduce in grade or pay under section 7106(a)(2)(A). It also asserts that it interferes with its right under section 7106(a)(2)(C) to select employees and that it violates FPM Chapter 335, Subchapter 1-4, Requirement 4. The Union contends that this provision is an appropriate arrangement within the meaning of section 7106(b)(3).

B. Analysis and Conclusions

This provision, as the Agency asserts and the Union tacitly concedes, would require the Agency to fill certain vacant positions. In American Federation of Government Employees, AFL-CIO, Local 3186 and Department of Health and Human Services, Office of Social Security Field Operations, Philadelphia Region, 23 FLRA No. 30 (1986) (Proposal 2), the Authority found that a proposal which mandated filling vacancies excessively interfered with an agency's rights to hire and assign employees under section 7106(a)(2)(A) and to make selections under section 7106(a)(2)(C) of the Statute. Thus, the Authority concluded the proposal was not an appropriate arrangement within the meaning of section 7106(b)(3). Because this provision, similarly, would abrogate the Agency's discretion to fill or not fill vacant positions, we find that it excessively interferes with the Agency's rights to hire and assign and to make selections in filling positions.

Even assuming that this provision did not constitute an excessive interference with management's rights, it is outside the duty to bargain under section 7117(a)(1) of the Statute because it is inconsistent with a Government-wide regulation, that is, Requirement 4 of Subchapter 1-4, Chapter 335 of the Federal Personnel Manual (FPM), which permits agencies to fill positions by making selections from any appropriate source. By limiting the Agency to the specified sources for filling the position involved, it contravenes that regulation by preventing the Agency from making selections from other appropriate sources, and is outside the duty to bargain. See American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 14 FLRA 801 (1984), aff'd sub nom. American Federation of Government Employees, Local 2782 v. FLRA, No. 85-1562 (D.C. Cir. Oct. 21, 1986).

Based on these reasons,[5] Provision 3 is not within the duty to bargain.

V. Provision 4

ARTICLE 33

CONTRACTING OUT

SECTION 3. Supervision

Bargaining unit employees will not be required to be supervised by persons who are not officers or employees of the Federal Government.

A. Positions of the Parties

The Agency asserts that this provision would interfere with its rights under section 7106(a)(2)(A) to assign employees and under section 7106(a)(2)(B) to determine the personnel by which agency operations are conducted. The Union's only explanation of the meaning of this provision is that it is clear and self-explanatory. In response to the Agency's arguments the Union contends that a supervisor must be an employee of an agency. In support of this it cites the definition of supervisor in section 7103(a)(10) of the Statute and an opinion regarding contracting for personal services issued by the Civil Service Commission (now OPM) in FPM Letters 300-8 (Dec. 12, 1967) and 300-12 (Aug. 20, 1968). Finally, it contends that this provision does not prevent the Agency from acting at all and is negotiable.

B. Analysis and Conclusions

In American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service, 11 FLRA 672 (1983) the Authority found that a proposal directly interfered with the agency's right to assign work by preventing the agency from requiring unit employees to carry out tasks assigned to them by individuals other than those specified in the proposal. Similarly, this provision would restrict the Agency's ability to require unit employees to carry out tasks assigned by individuals other than those specified in the provision and, for that reason, conflicts with section 7106(a)(2)(B).

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[5] We do not find it necessary to pass upon the Agency's argument that this provision also violates its rights to layoff, retain, remove or reduce in grade or pay.

The provision would also directly interfere with the Agency's discretion to determine the personnel who would conduct agency operations under section 7106(a)(2)(B). Under this provision the Agency would be precluded from having contractor and some, if not all, military personnel[6] perform supervisory functions in connection with the bargaining unit. Consequently, it would establish a substantive contractual limitation on the Agency's ability to determine the personnel who would conduct its operations. See National Federation of Federal Employees, Locals 1707, 1737 and 1708 and Headquarters, Louisiana Air and Army National Guard, New Orleans, Louisiana, 9 FLRA 148 (1982).

Consideration of the Union's suggestion that this provision merely reflects a limitation set forth in the Statute and the FPM does not lead us to a different result. The Union's reliance on the definition of "supervisor" in section 7103(a)(10) is misplaced. That subsection simply enumerates duties and responsibilities which would identify individuals as supervisors for purposes of including or excluding them from bargaining units.[7] It does not substantively limit an agency's discretion to determine which personnel will perform those duties and responsibilities. As to the FPM, assuming without deciding that FPM Letters 300-8 and 300-12 are Government-wide rules or regulations and assuming further that the Union correctly interprets them as effectively prohibiting agencies from allowing contractor personnel to supervise Federal employees, this does not render the provision negotiable. The Authority has found that reiteration in a contract of restrictions on management rights which are found in Government-wide rules and regulations imposes an independent contractual limitation upon management's discretion with respect to those rights. Incorporation of such limitations in the contract would require management to continue to comply with the restrictions during the term of the agreement regardless of whether the particular restrictions were subsequently removed from the rules or regulations involved. This type of contractual provision, which does not merely recognize an *external* limitation but imposes a substantive limitation on the exercise of management's rights, is non-negotiable. *See, for example, National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 FLRA 574 (1981) (Proposal 1), *aff'd sub nom. National Federation of Federal Employees, Local 1167 v. FLRA*, 681 F.2d 886 (D.C. Cir. 1982). Thus, Provision 4 is nonnegotiable.8/

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[6] Military personnel are neither "officers" nor "employees" within the meaning of Title 5. 5 U.S.C. §§ 2105 and 7103(a)(2). Enlisted military personnel are not "officers" within the meaning of Title 10. 10 U.S.C. § 101.

[7] H. R. REP. No. 95-1403, 95th Cong., 2d Sess. 39, 40 (1978), reprinted in Sub-comm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96 Cong. 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 685, 686 (Comm. print No. 96-7).

VI. *Order*

The Union's petition for review is dismissed insofar as Provisions 1, 3 and 4 are concerned. The Agency must rescind its disapproval of Provision 2.

Issued, Washington, D.C. December 5, 1986.

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY9/

8/ We do not find it necessary to pass upon the Agency's argument that this provision would also violate the Agency's right under section 7106(a)(2)(A) to assign employees.

9/ Jerry L. Calhoun did not participate in this case in view of his involvement with the dispute as an official at the Department of Defense prior to becoming Chairman of the Authority.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1897

Union

and

Case No. 0-NG-757

DEPARTMENT OF THE AIR FORCE
EGLIN AIR FORCE BASE, FLORIDA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues as to the negotiability of a single Union proposal. We find that the proposal is negotiable.

II. Union Proposal

> . . . that the Eglin and Hurlbut Nonappropriated Fund Instrumentality (NAFI) absorb up to 75 percent of the cost of health insurance prior to proposing to prorate any portion of the additional increase in cost to unit employees. Further, no increase will be imposed until all obligations under 5 USC 7117 have been fully satisfied.

III. Positions of the Parties

The proposal would require the Agency to pay up to 75 percent of the premium cost of employee health insurance prior to increasing the amount currently paid by bargaining unit employees and to fulfill its duty to bargain with the Union prior to implementing any change in cost of health insurance premiums for bargaining unit employees. The Agency contends the proposal is outside the duty to bargain because it does not concern conditions of employment of bargaining unit employees, affects employees outside the bargaining unit, interferes with its right under section 7106(a)(1) of the Statute to determine its budget, and is inconsistent with an Agency "regulation" for which there is a compelling need under section 7117(a)(2). The Union disputes the Agency's contentions.

IV. Analysis and Conclusions (Footnotes appear in the Appendix to this Decision)

A. Background

1. Establishment of Wages and Fringe Benefits for Federal Employees

In the Federal sector, the wages and fringe benefits of most employees are established by law. For example, 5 U.S.C. Chapter 53 controls many matters relating to various pay rates and systems. Among other things, it establishes the General Schedule and Prevailing Rate pay systems. Chapter 55 of title 5 contains provisions which govern pay administration including overtime and other premium pay. Chapters 83, 87 and 89 establish programs covering retirement, life insurance and health insurance, respectively. These laws, however, do not apply uniformly to all Federal employees. Some Federal agencies and some types of employees who are covered by the Statute for purposes of collective bargaining are not covered by one or another of these laws. For example, the Federal Deposit Insurance Corporation is not subject to the statutes governing pay rates. Nonappropriated Fund Instrumentality (NAFI) employees as are involved in this case are not covered by laws relating to health insurance or retirement. Teachers employed by the Department of Defense Dependents Schools, whether overseas or at schools on military installations in the United States, are not subject to statutes establishing pay rates for most Federal employees but to laws creating different salary systems. Thus, while wages and fringe benefits of most Federal employees are established and controlled by law, there are some exceptions where matters concerning the nature or amount of the wages and fringe benefits are left to the discretion of the employing agencies.

2. The Scope of Bargaining under the Statute

a. The Language of the Statute

The Statute provides that the scope of the duty of an agency to bargain with an exclusive representative of its employees extends to "conditions of employment," which term is further defined as "personnel policies, practices and matters affecting working conditions." Section 7103(a)(12) and (14). Excluded from the definition of conditions of employment are matters: (1) relating to political activities prohibited under subchapter III of chapter 73 of title 5; (2) relating to the classification of any position; or (3) to the extent such matters are specifically provided for by Federal statute. Section 7114(a)(14). The Statute also excludes from the scope of the duty to bargain proposals which concern conditions of employment but which are inconsistent with law and regulation. Section 7117(a). Thus, under the Statute a proposed matter which is a condition of employment and is not inconsistent with applicable law or regulation is within the duty to bargain.

b. Legislative History and Congressional Intent

The legislative history of the Statute supports the conclusion that Congress intended that matters relating to wages and fringe benefits were to be treated in the same manner as other conditions of employment. That is, proposals concerning them were to be within the duty to bargain under section 7117(a) "to the extent not inconsistent with any [applicable law, rule or regulation]" and they were to be excepted from the definition of conditions of employment under section 7103(14)(c) if they involved matters which were "specifically provided for by Federal statute." The Report accompanying the House Committee bill (H.R. 11280) states that ". . . Federal pay will continue to be set in accordance with the pay provisions of title 5, and fringe benefits, including retirement, insurance, and leave, will continue to be set by Congress."1/ In discussing the negotiation of matters relating to overtime, the House Report states that "[r]ates of overtime pay are not bargainable, because they are specifically provided for by statute."2/

When the House Committee bill was debated on the House floor, Members who supported the bill reaffirmed this interpretation. Congressman Ford, discussing the scope of the duty to bargain under the bill, asserted that "no matters that are governed by statute (such as pay, money-related fringe benefits, retirement, and so forth) could be altered by negotiated agreement."3/ Even opponents of the House Committee bill agreed that the duty to bargain under that bill excluded wages and fringe benefits because they were established by law. Congressman Collins, in support of his proposed substitute for the House Committee bill, described the duty to bargain under the Committee bill as too broad because it only excluded "matter[s] relating to discrimination, political activities, and those few specifically prescribed by law--for example, pay and benefits."[4] And finally, Congressman Udall, whose compromise version of H. R. 11280 formed the basis of the legislation enacted by Congress and signed into law by the President, stressed that under the "Udall substitute" matters concerning "wages and hours and retirement and benefits will continue to be established by law through congressional action."[5] There are also a number of statements to the effect that bargaining is not intended with respect to pay and fringe benefits. While these statements are not explicitly tied to the existence of other legal provisions governing those matters, they were made in the context of the general debate on the bill.[6] Moreover, these statements must be read within the context of the specific provision of the Statute itself. The Statute as enacted established an explicit scope of bargaining along with explicit exceptions. Nowhere in the Statute is there any language either excluding the general subject of wages and fringe benefits from the definition of conditions of employment or otherwise prohibiting negotiations on such matters in particular.

The only explicit statement regarding the obligation to negotiate over wages appears at section 704 of the Civil Service Reform Act of 1978[7] (CSRA). This section authorizes bargaining on wages and "employment benefits" for certain prevailing rate employees whose wage rates would otherwise be controlled by the procedures established under the Prevailing Rate Act of 1972, Pub. L. No. 92-392. Section 704 is simply an extension and clarification of section 9(b) of the Prevailing Rate Act, which exempted prevailing rate employees who had previously negotiated wages and other conditions of employment from the coverage of that Act.[8] *See Columbia Power Trades Council and United States Department of Energy, Bonneville Power Administration*, 22 FLRA No. 100 (1986). In the absence of that exemption, the wages of those employees would have been established pursuant to law. Consequently, section 704 by authorizing such bargaining, acts as an exception to the limitation on bargaining over matters which are specifically provided for by Federal statute or which are inconsistent with law.

The Statute and its legislative history should be read in light of the Executive Orders which preceded it. In this regard the Report accompanying Executive Order 10988 stated that "[t]he employer in most parts of the Federal government cannot negotiate on pay, hours of work or most fringe benefits. These are established by law."[9] This statement accurately reflected the legal context of Federal employment as outlined above: most Federal agencies and employees were, as they continue to be, subject to the laws establishing pay and fringe benefits, but some are not.[10] Likewise under Executive Order 11491, the duty to bargain similarly extended to personnel policies, practices and matters affecting working conditions "so far as may be appropriate under applicable laws and regulations." Section 11(a).

Consistent with this principle, only those Federal employees whose wages and fringe benefits were not established by law could bargain over them under the Executive Order. For example, in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 211 (1972), the Federal Labor Relations Council (the Council) ruled in essence that the pay of the faculty at the Merchant Marine Academy was not specifically established by law. Rather, the Merchant Marine Act gave the Secretary of Commerce discretion to set faculty salaries. The Council held that proposals relating to teacher salary schedules did not violate those laws and, since they were otherwise negotiable, were within the agency's duty to bargain. In Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, 6 FLRC 231 (1978), the Council held that proposals prescribing procedures and formulas to be used in determining teacher compensation were within the duty to bargain. The Council determined that the Department of Defense Overseas Teachers Pay and Personnel Practices Act, 73 Stat. 213 (1959), did not bar negotiation on the proposal. In other cases the Council held proposals concerning wages and fringe benefits nonnegotiable not because they were not matters affecting conditions of employment but, rather, because they were inconsistent with applicable laws and regulations. For example, in American Federation of Government Employees, Local 1778 and McGuire Air Force Base, New Jersey, 6 FLRC 136 (1978), the Council held proposals relating to wage rates and retirement plans nonnegotiable because the agency established that they conflicted with an agency regulation for which a compelling need existed. Although this decision is relied upon by the Agency and the dissenting opinion in this case, we believe such reliance is inapposite. See section B.4. of this decision. Also, in International Association of Siderographers, AFL-CIO, Washington Association and Department of the Treasury, Bureau of Engraving and Printing, 6 FLRC 1157 (1978), the Council held that a proposal, which established a standard for setting the pay of certain employees of the Bureau of Engraving and Printing, was nonnegotiable because it was inconsistent with law.

c. Summary

Congress intended the basic scope of the duty to bargain to be at least the same under the Statute as it was under the Executive Order.[11] Under both, the duty to bargain explicitly extends to personnel policies, practices, and matters affecting the working conditions of bargaining unit employees. Bargaining over proposals inconsistent with applicable controlling law or regulation, however, is not permitted.

Under the Executive Order the Council held pay and fringe benefits proposals to be bargainable to the extent that they concerned matters which were (1) within the discretion of agencies and (2) not inconsistent with applicable laws and regulations. These decisions were a part of the record before the Congress when it enacted the Statute. Usually when Congress adopts a new law which incorporates provision of prior law, it is presumed to be aware of administrative interpretation of that law and to adopt those interpretations. See Lorillard v. Pons, 434 U.S. 575 (1978), see also New York Council, Association of Civilian Technicians v. FLRA, 757 F.2d 502, 509 (2nd Cir. 1985); Florida National Guard v. FLRA, 699 F.2d 1082 (11th Cir. 1983). Had Congress intended that a different approach as to the negotiability of pay and fringe benefits be applied under the Statute, it could very easily have incorporated specific language in the Statute to accomplish that effect. It should be noted that Congress used specific language to except from the obligation to bargain matters relating to political activities prohibited under subchapter III of chapter 73 of title 5 and the classification of positions. Section 7103(a)(14)(A) and (B). However, it has not incorporated such an exclusion regarding pay, fringe benefits or any related matters.

We are of the view that the legislative history of the Statute, read as a whole regarding bargaining over pay and fringe benefits, does not compel a conclusion that Congress sought to deviate from either Executive Order practice or from the overall definition of the scope of the duty to bargain embodied in the Statute. Usually legislative history is used to clear up ambiguities in statutory language. However, the fact that a statute has relatively plain meaning should not serve to thwart or distort the intent of Congress by excluding from consideration enlightening material from legislative history. Nonetheless the clearer the statutory language, the more compelling the legislative history must be to overcome that language. 2A N. Singer, Sutherland Stat. Const. § 48.01 (4th Ed. 1984). The more precise statements in the legislative history, as noted above, specifically tie the prohibition on bargaining over pay and fringe benefits to the existence of other laws which govern those subjects. Other more general statements are couched in terms of assurances that the legislation under consideration does not represent a radical change or significant expansion in the scope of Federal sector collective bargaining. See, for example, the Clay and Ford statements quoted at note 6, infra, which appeared at H.R. Rep. No. 95-1403, 95th Cong., 2nd Sess. 377 (1978); Legislative History at 721 and 124 Cong. Rec. H8467 (daily ed. Aug. 11, 1978); Legislative History at 854-6. Still others, simply state that pay and fringe benefits are not negotiable. See, note 6, infra, at 2 app.

Even taking the legislative history in a light most favorable to the Agency's position that pay and fringe benefits are not negotiable, that history is at best ambiguous. However, the definition of the scope of bargaining which is embodied in the Statute is perfectly clear. Under that definition, and consistent with practice under the Executive Order, substantive proposals regarding pay and fringe benefits which are not specifically provided for by Federal statute, and any other conditions of employment are negotiable to the extent they are not inconsistent with applicable laws, rules and regulations if the matters proposed are within an agency's discretion. To the extent that Chairman Calhoun's dissenting opinion implies otherwise, we respectfully disagree. Ambiguous legislative history does not compel a different conclusion. See American Federation of Government Employees, Locals 225, 1504, and 3723, AFL-CIO v. FLRA, 712 F.2d 640, 649 (D.C. Cir. 1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971).

While not of controlling significance, of course, as to determining what is the scope of the duty to bargain under the Statute, we note that where Congress expressly establishes pay and fringe benefits for Federal employees, that legislative process is not without its elements of "negotiation." The setting of wages is accomplished by the same process as any other piece of legislation. Typically, the President submits a pay proposal, both the Senate and House of Representatives consider the proposal, unions and other interested parties lobby, they along with representatives of the Administration may testify, and a compromise may have to be reached. Finally, a bill passes, which the President must act on before the process is completed. So, where Congress does not expressly establish pay and fringe benefits, some balancing of forces and interests through negotiations is consistent with that process.

3. Decisions under the Statute

Consistent with this statutory definition of the scope of bargaining, the Authority has held substantive proposals regarding pay nonnegotiable if they relate to a matter specifically provided for by Federal law. For example, American Federation of Government Employees, AFL-CIO, Council of Federal Grain Inspection Locals and United States Department of Agriculture, Federal Grain Inspection Service, Washington, D.C., 3 FLRA 530 (1980), aff'd sub nom. American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority, 653 F.2d 669 (D.C. Cir. 1981); National Treasury Employees Union and Pension Benefit Guaranty Corporation, 9 FLRA 692 (1982), aff'd sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, 711 F.2d 420 (D.C. Cir. 1983). In other cases, the Authority has held proposals on wage-related matters negotiable if they do not concern matters specially provided for by law and are otherwise consistent with applicable law and regulations. Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina, 12 FLRA 519, 521 (1983).

B. Negotiability of the Proposal in This Case

1. The Proposal Does Not Concern Matters Provided for by Law

The Agency states that "premiums for 'health insurance benefits' for the employees [nonappropriated fund employees] concerned in the instant case have never been paid pursuant to a Federal statute." Agency Statement of Position at 9. Nonappropriated fund employees are excluded from the coverage of Chapter 89 of title 5 of the United States Code, which governs health insurance plans administered by the Office of Personnel Management.[12] Health insurance matters with respect to these employees are governed by agency regulation. Since the proration of the cost of premiums for health insurance benefits is not a matter specifically provided for by Federal statute, this matter is not excepted from the definition of conditions of employment under section 7103(a)(14)(C) of the Statute.

2. The Proposal Does Not Determine the Conditions of Employment of Nonunit Employees

The Agency claims that, since Nonappropriated Fund Instrumentalities (NAFIs) with finite amounts of money are involved herein, the proposal could affect employees outside the bargaining unit. Thus, according to the Agency, the proposal would concern matters beyond the conditions of employment of bargaining unit employees and would be outside its duty to bargain. The Agency, in essence, is claiming that, if it pays more toward the cost of health insurance premiums for bargaining unit employees than it pays for nonbargaining unit employees, the latter employees will be affected thereby either because they will receive less toward their health insurance premiums or less towards the cost of some other employer-provided benefit than they had previously received.

It is well settled that matters which are conditions of employment of employees in a bargaining unit and are within the discretion of the agency involved are within the duty to bargain. For example, National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748, 759-60 (1980). Proposals which directly determine, that is prescribe, the conditions of employment of nonunit employees are outside the duty to bargain. However, otherwise negotiable proposals which directly determine conditions of employment of bargaining unit employees are not rendered nonnegotiable simply because they also affect conditions of employment outside of the bargaining unit to a limited degree or in an indirect way. American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49 (1986), petition for review filed sub nom. American Federation of Government Employees, Local 32 v. Federal Labor Relations Authority, No. 86-1447 (D.C. Cir. Aug. 11, 1986).

The Union claims that the proposal does not concern employees outside of the bargaining units involved and states that it "merely requires the agency to do something with respect to bargaining unit employees while allowing the agency to maintain the status quo for employees outside the unit [.]" Union Reply Brief at 8. The proposal does not prescribe what the Agency would pay towards the cost of nonbargaining unit employee benefits or even that it make lesser contributions as opposed to using other means to finance its increased costs with respect to bargaining unit employee benefits. Consequently, we cannot conclude that the proposal directly determines the conditions of employment of nonunit employees. Based on the principles set forth above, the Agency's argument does not present a basis for finding the proposal nonnegotiable.

Moreover, we believe the argument is basically flawed. Much of collective bargaining entails the distribution of finite resources. The Agency's argument seems to presume that Congress intended to establish a system in which the duty to bargain arises only where infinite resources are available to it. Compare American Federation of Government Employees v. Federal Labor Relations Authority, 785 F.2d 333, 337-8, (D.C. Cir. 1986) in which the Court noted that under the Statute an agency was not released from its duty to bargain whenever it had suffered economic hardship.

3. The Proposal Does Not Directly Interfere With Management's Right To Determine Its Budget Under Section 7106(a)(1)

The Agency also contends that since it has decided to pay 46% of the cost of health insurance premiums for all covered employees, any increase in the employer's share of bargaining unit employee premium payments would require adjustments to other budgetary allocations considering the funding process of NAFIs. Thus, according to the Agency, the proposal has a direct impact on budgetary items and interferes with management's right to determine its budget.

We find that the Union's proposal would not directly interfere with the Agency's right to determine its budget. Under the test set forth in American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982), we find that the proposal does not require the Agency to include a particular program or operation in its budget. Employer contributions to the cost of employee health insurance premiums are already included in budgets of the NAFIs at Eglin and Hurlbut Air Force Bases. Agency Statement of Position at 10-14. The proposal does not directly determine the specific amount which the Agency must allocate to that program. It establishes a percentage of the total premium cost to be absorbed by the Agency. What that percentage means in terms of the amount to be budgeted depends on factors not covered by the proposal, but within the Agency's control, such as total premium cost and number of employees subject to the health insurance program. Furthermore, the Agency has not made a substantial demonstration that the proposal would result in significant and unavoidable costs which are not offset by compensating benefits. The Agency claims that implementation of the Union's proposal would potentially increase the costs of the employer's share of health insurance premiums. Agency Statement of Position at 11-13. The Agency does not show, however, that such an increase would be unavoidable or that it would not be offset by compensating benefits.

4. The Agency Has Not Demonstrated a Conflict between the Proposal and Agency Regulations

The Agency argues that a compelling need exists for a uniform, centrally managed health insurance program. It contends that its program, including its policy determinations as to the employer contributions to the premium cost, meets the Authority's criteria for determining compelling need set forth at 5 CFR § 2424.11(a). In its statement of position it provides no specific citation to its rules and regulations but relies generally on Department of the Air Force and Department of Defense regulations which set forth personnel policies and procedures pertaining to NAF instrumentalities and employees. It has submitted "relevant excerpts" of Air Force Regulations 34-3 and 40-7 as well as Department of Defense Regulation 1401.1-M.

To establish a compelling need for an agency-wide regulation, an agency must: (1) identify a specific agency-wide regulation; (2) show that there is a conflict between its regulation and the proposal; and (3) demonstrate that its regulation is supported by a compelling need with reference to the Authority's standards set forth in section 2424.11 of its regulations. Generalized and conclusionary reasoning is not enough to support a finding of compelling need. American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Madison Region, 21 FLRA No. 104 (1986) (Proposal 7). Here, the Agency has not even demonstrated that the proposal actually conflicts with a specific agency-wide regulation. The excerpts of regulations which it has submitted generally set forth policies, organization, and practices for the administration and management of NAFIs and their employees. Among other things, the regulations place responsibility for policy direction of all Air Force NAFIs with the Air Force Welfare Board (AFWB) and provide for an Agency-sponsored group health insurance plan. However, nowhere do the excerpted portions of the regulations submitted prescribe what percentage of the premium will be paid by the employer or even that the percentage should be uniform throughout the Agency NAFI system. Moreover, we do not view local negotiations over the level of employer contribution to the premium as inherently inconsistent with the general concept of providing central management and policy direction in the NAFI system or a uniform program of health insurance benefits. See American Federation of Government Employees, AFL-CIO, Local 2670 and Army and Air Force Exchange Service, Keesler Air Force Base Exchange, Mississippi, 10 FLRA 71, 73-75 (1982). Therefore, the Agency's assertion that the proposal conflicts with an agency rule or regulation for which a compelling need exists cannot be sustained.

The reliance placed by the Agency on the decision of the Federal Labor Relations Council in *American Federation of Government Employees Local 1778 and McGuire Air Force Base, New Jersey*, 6 FLRC 136 (1978) is inapposite. First of all, in *McGuire Air Force Base* the Council found that the agency had established a conflict between the proposals which were in dispute and the agency's regulations. The Agency has not established such a conflict in the present case. Moreover, the proposals which were involved in *McGuire Air Force Base* are materially different from the proposal in the present case for the following reasons.

Proposals I and III in *McGuire Air Force Base* would have rendered negotiable the pay of certain categories of NAFI employees. The Council held that the agency had established that its regulations concerning employee pay with which the proposal conflicted were essential to effectuate the "public interest" which, the Council stated, was "expressly set forth by Congress in Public Law 92-392" which covered some NAFI employees and had been extended administratively to cover other NAFI employees, including those to whom the proposals would apply, "'consistent with [an agency] committment to Congress' during the legislative process." In the present case no such public interest, either Congressionally or otherwise defined, has been established by the Agency.

Proposal IV in *McGuire Air Force Base* sought to establish a separate retirement plan for employees in the bargaining unit in place of the single plan which existed to cover all NAFI employees in the Air Force. The agency established that the public interest in a financially solvent, secure and completely dependable plan for retiring NAFI employees would not be effectuated by the separate plan which was proposed. In sharp contrast, the proposal at issue in the present case does not seek to except the NAFI employees at Eglin Air Force Base from the central health insurance program which the Agency has established. Moreover, it has not been shown that the proposal would prevent the effectuation of the public interest in assuring a dependable health insurance program for any NAFI employees.

Finally, while not of controlling significance as to determining whether a matter is within the duty to bargain under the Statute, we note that for most Federal employees, there is a wide selection of health plans from which to choose. The choices range from different benefits to different levels of contribution by both the individual and the Federal government. These plans have been negotiated with the providers of the health plans. Through this procedure, these employees have been given the capability to select the plan which meets their needs and, most importantly, is within their financial ability to pay. It would seem that this same capability should be available to other employees.

V. Summary and Conclusion

The subject of wages and fringe benefits is not in and of itself excluded from the scope of the duty to bargain as defined by the Statute. The proposal in this case does not relate to a matter which is specifically provided for by Federal statute and, therefore, does not come within the exceptions to the definition of conditions of employment under section 7103(a)(14)(C) of the Statute. Moreover, the proposal does not determine the conditions of employment of nonunit employees or interfere with the Agency's right to determine its budget. Lastly, the Agency has not established that the proposal conflicts with an agency rule or regulation for which a compelling need exist. Consequently, we find that the proposal is within the duty to bargain.

VI. Order

The Agency shall upon request or as otherwise agreed to by the parties, negotiate over the Union's proposal.[13]

Issued, Washington, D.C., December 9, 1986.

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

DISSENTING OPINION OF CHAIRMAN CALHOUN

I respectfully disagree with my colleagues. I conclude that the proposal in this case is not a proper subject of bargaining. I also disagree with my colleagues in their analysis of the extent to which wages and money-related fringe benefits (including the determination of health insurance benefits) are appropriate subjects of collective bargaining for certain Federal employees beyond this case.

Non-appropriated Fund Instrumentality (NAFI) employees are a unique group of Federal employees. Although they enjoy the right to organize and bargain collectively under the Federal Service Labor-Management Relations Statute (the Statute), they do not serve in the competitive service and are not subject to a wide range of the statutorily created benefits (and strictures) shared by most Federal employees. See 5 U.S.C. § 2105.

In lieu of the statutory and regulatory scheme applied to most Federal employees, NAFI employment within the Department of Defense is generally governed by a comprehensive regulatory scheme emanating from the Secretary of Defense and further implemented world-wide by various components of the military departments. In my view, this regulatory scheme equates to the statutory provisions affecting the wages and monetary fringe benefits of most Federal employees. As such, I conclude that a compelling need exists for the regulatory scheme, and matters provided for by those regulations are therefore not a proper subject of collective bargaining.

Eight years ago the Authority's predecessor organization, the Federal Labor Relations Council, addressed the efficacy of these very same regulations. In American Federation of Government Employees, Local 1778 and McGuire Air Force Base, New Jersey, 6 FLRC 136 (1978), the Union sought to negotiate proposals concerning both the pay and retirement systems for NAFI employees. The Council found both proposals to be nonnegotiable because a compelling need existed for the Department of Defense and Department of the Air Force Regulations setting forth comprehensive compensation schemes concerning the subject matter of the proposals. Specifically with respect to the matter of contributions to the retirement plan, the Council found that the centrally administered retirement program which provided benefits generally comparable to those provided Federal Civil Service employees, "effectuates the public interest" and that "uniformity is essential to the assurance of a financially solvent and fully reliable retirement program for the NAF employees here involved." 6 FLRC at 148.

While I recognize that the criteria used to determine compelling need questions have been modified under Authority regulations, those modifications do not prevent reaching the same conclusion in the instant case. It is my view that the regulatory scheme remains "essential, as distinguished from helpful or desirable, to the accomplishment of the mission or execution of functions of the agency . . . in a manner which is consistent with the requirements of an effective and efficient government." 5 C.F.R. § 2424.11(a). I find no reason to depart from the holding and precedent of the Council in McGuire Air Force Base. See 5 U.S.C. § 7135. I share the same concerns expressed by the Council about the need for uniformity of treatment of NAFI employees. To have such matters negotiable at Eglin Air Force Base and nonnegotiable at McGuire Air Force Base makes no sense whatsoever. These concerns lead me to conclude that absent evidence of express Congressional intent to make wages and monetary fringe benefits a subject of collective bargaining in the Federal sector the Authority should not, as a general proposition, find such proposals negotiable.

Although I believe this case can, and should be, resolved on the basis of compelling need, it is my opinion that extremely important public policy considerations attach to the Authority's adjudication of a number of pending cases now before us which involve the negotiability of bargaining proposals relating to matters of compensation or monetary-related fringe benefits. These cases require uniform resolution of issues similar to the one in this case. Therefore I turn to the question my colleagues raise as to what issues relating to wages and money-related fringe benefits are in their view appropriate subjects of collective bargaining.

As described in the majority opinion, the wages and fringe benefits of most Federal employees are established by law. However, there are in excess of 40 Federal pay systems which are not subject to statutorily determined salary and wage schedules. Agency heads have the authority under these systems to determine the pay of Federal service employees working within their respective agencies. Many of these compensation systems have evolved without any apparent recognition, endorsement, or legislative attention by the Congress.

My colleagues conclude that in every case where there is discretion involved or when Congress is silent, the matters at issue are appropriate for collective bargaining. That hypothesis has superficial appeal. I would, however, go further to recognize that as Members of the Authority we have an affirmative obligation to look behind such pronouncements and weigh the interests of the parties, and all related policy considerations. Sometimes examination of these factors will indicate a necessity for judicial restraint in the face of Congressional silence, and a finding to withhold a matter from bargaining. I believe that is the case here. In the absence of a clear expression of Congressional intent to make these matters negotiable, the Authority should not imply such an intent.

The legislative history discussed in the majority opinion is not conclusive of the matter but does, I believe, lend support to the general proposition that Congress in enacting the Statute did not intend wage and monetary fringe benefits to be included in the basic scope of Federal sector collective bargaining. For example, Congressmen Clay and Ford, the primary sponsors of the labor management relations bill, stated in Supplementary comments to the staff report accompanying their bill:

> Those of our colleagues who are concerned that this bill will significantly expand the collective bargaining rights of Federal employees need not worry. It does not. Enactment of the committee approved labor-management title will continue to deny to Federal employees most of the collective bargaining rights which their counterparts in the private sector have enjoyed for over 40 years. Among the collective bargaining rights not included in the bill are:
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> . . . .
>
> (2) The right to bargaining collectively over pay and money-related fringe benefits such as retirement benefits and life and health insurance[.] H.R. REP. NO. 95-1403, 95th Cong., 2nd Sess. 377 (1978); Legislative History, at 721.

Congressman Udall, whose substituted version of the Ford-Clay bill formed the basis for the legislation enacted by Congress, stated:

> There is not really any argument in this bill or in this title about Federal collective bargaining for wages and fringe benefits and retirement-- the kinds of things that are giving us difficulty in the Postal Service today. All these major regulations about wages and hours and retirement and benefits will continue to be established by law through congressional action. (emphasis supplied) 124 Cong. Rec. H 9633 (daily ed. Sept. 13, 1978); Legislative History, at 923.

Congress did not provide specific authorization for negotiation of pay and fringe benefit matters affecting the wide variety of administratively determined pay systems which are not a part of the statutory Federal pay structure. Thus it is my view that the question of the negotiability of such matters is not definitively resolved by resort to the legislative history of the Statute. Absent specific indication of a Congressional intent to make pay and monetary fringe benefits a subject of labor-management negotiations, I believe that strong public policy considerations exist for permitting agencies to establish unified, consistent systems for determining such matters. To find such matters generally negotiable would likely result in the internal balkanization of salaries and benefits within the various pay systems. This would destroy the uniformity sought by the Congress in providing specific methodologies for pay setting in administratively determined systems. I find support for this determination in certain actions taken by the Congress in the past.

When Congress passed the Postal Reorganization Act (PRA), 39 U.S.C. §§ 101-5605 (1976 & Supp. V 1981), it gave postal employees the right to bargain over all compensation, benefits and other conditions of employment. Congress in effect "created a new kind of Federal employee." 1/ "Postal workers would henceforth be hybrid employees, with some of the rights and benefits of federal employees and some of the rights and benefits of private employees, most importantly, the right to bargain collectively [on compensation issues]." American Postal Workers Union v. U.S. Postal Service, 707 F.2d 548, 556 (D.C. Cir. 1983). Thus where Congress chose to introduce unrestricted wage and benefit bargaining into the federal labor relations scheme, it manifested such an intent by statutory expression which serves to define the parameters within which such activity would be conducted. 2/

Other variations to the normal Federal pay setting structure are also evidenced by affirmative Congressional action. When Congress established the "prevailing rate system," 5 U.S.C.

1/ 116 Cong. Rec. 20,229 (1970) (remarks of Congressman Udall.)

2/ Postal Service labor-management relations are conducted under the National Labor Relations Act (NLRA), 29 U.S.C. § 151, et seq. In enacting the Federal Service Labor-Management Relations Statute, Congress did not include employees of the Postal Service, or the Tennessee Valley Authority (an analogous labor relations situation) within the coverage of the basic Federal sector program.

§§ 531-5349, 3/ and allowed collective bargaining by certain skilled trade and craft employees on monetary issues, it did not leave the parties to determine the scope of such negotiations but instead provided clear procedures for the determination of such matters. Previous Congressional expressions that collective bargaining by such employees was in the public interest were specifically carried forward in section 704 of the Civil Service Reform Act. See, for example, Columbia Power Trades Council and United States Department of Energy, Bonneville Power Administration, 22 FLRA No. 100 (1986).

In International Organization of Masters, Mates, and Pilots v. Brown, 698 F.2d 536 (D.C. Cir. 1983), the court, in finding that high ranking civilian mariners were subject to the "pay cap" provisions of 5 U.S.C. § 5373, stated that "Congress wanted the pay cap to cut a wide swath . . . Congress deliberately and expressly carved out certain exceptions . . . but did not exempt the mariners." Id. at 542. Absent indications to the contrary I can only conclude that Congress intended by its expressions of intent that wages and money-related fringe benefits be excluded from collective bargaining, to cut the same "wide swath" when it enacted the Statute.

With the notable exception of prevailing rate employees and postal workers, I conclude that Congress envisioned that the pay and monetary benefits of Federal employees covered by the Statute be set in a uniform manner, whether by statute or administrative action. Congressional recognition of the need for stability and uniformity among prevailing rate employees is found in 5 U.S.C. § 5341, and the Authority has previously accepted such a finding in determining the existence of a "compelling need" for agency regulations setting uniform pay systems for employees not covered by, but serving in positions analogous to, those covered by the General Schedule. National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C., 14 FLRA 598 (1984), decision on remand, 21 FLRA No. 36 (1986).

J. L. Calhoun

Jerry L. Calhoun, Chairman

3/ The prevailing rate system provides method by which the pay of certain craft and skilled employees may be adjusted from time to time so that their compensation is consistent with that of employees in the private sector. Such adjustment must be accomplished "consistent with the public interest." See National Maritime Union of America v. United States, 682 F.2d 944 (Ct. Cl. 1982).

APPENDIX

1/ H.R. REP. NO. 95-1403, 95th Cong., 2nd Sess. 12 (1978); *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* at 682. (Herein after referred to as "*Legislative History*.")

2/ H.R. REP. NO. 95-1403, 95th Cong., 2nd Sess. 44 (1978); *Legislative History* at 690.

3/ *See* the remarks of Congressman Ford, 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1987); *Legislative History* at 855-56.

4/ *See* the statement of Congressman Collins in support of his substitute for the House Committee bill:

> The House committee bill, on the other hand, broadly defines scope of bargaining by saying that "conditions of employment" excludes only matter relating to discrimination, political activities, and those few specifically prescribed by law--for example, pay and benefits.

124 Cong. Rec. H9624 (daily ed. Sept. 13, 1978); *Legislative History* at 906.

5/ *See* the remarks of Congressman Udall, 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978); *Legislative History* at 923: "All these major regulations about wages and hours and retirement and benefits will continue to be established by law through congressional action."

6/ *See, for example*, H.R. REP. No. 95-1403, 95th Cong., 2nd Sess. 5 (1978); *Legislative History* at 681 which states as follows:

> Title VII establishes a new program and provides for greater employee and employee organization participation. However, title VII does not authorize collective bargaining on substantive issues of pay and fringe benefits, as is currently permitted in some agencies, such as the Postal Service, the Tennessee Valley Authority, and the Bonneville Power Administration.

Congressmen Clay and Ford, the primary sponsors of the labor-management relations bills previously introduced in Congress, stated in supplementary comments to the Committee Report as follows:

> Those of our colleagues who are concerned that this bill will significantly expand the collective bargaining rights of Federal employees need not worry. It does not. Enactment of the committee approved labor-management title will continue to deny to Federal employees most of the collective bargaining rights which their counterparts in private sector have enjoyed for over 40 years. Among the collective bargaining rights not included in the bill are:
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> . . . .
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> (2) The right to bargain collectively over pay and money-related fringe benefits such as retirement benefits and life and health insurance[.]

H.R. REP. NO. 95-1403, 95th Cong., 2nd Sess. 377 (1978); Legislative History at 721.

Congressman Clay and Ford reiterated this position in their comments supporting H.R. 11280 in the House debate on the bill. In particular, Congressman Clay states as follows:

> I also want to assure my colleagues that there is nothing in this bill which allows Federal employees . . . to negotiate over pay and money-related fringe benefits.

124 Cong. Rec. H8466 (daily ed. Aug. 11, 1978); Legislative History at 853. See also the remarks of Congressman Clay at 124 Cong. Rec. E429 (daily ed. Aug. 3, 1978); Legislative History at 839-40.

Congressman Ford stated as follows:

> A committee print of title VII was used for markup purposes. That print was similar to H.R. 9094 [a bill sponsored by Congressmen Clay and Ford] except that . . . there was no provision for the negotiation of pay and other major money related fringe benefits.
>
> . . . . . .

> I have been quite frankly surprised with the rhetoric and hysteria that has accompanied consideration of title VII. It is not a radical departure from the present system, but is a small, incremental step forward.
>
> As the sponsor of H.R. 1589, the Federal Employees Labor Relation Act of 1977, the predecessor to H.R. 9094, which provided for the negotiation of pay and fringe benefits; the negotiation of all agency regulations; and automatic agency shop; and a limited right to strike (based on Canadian law)--all of which, I might emphasize, have been deleted from title VII--I can assure Members that expansion in the scope of bargaining in title VII has been a very modest, incremental step that comes nowhere near the scope of bargaining that most [s]tates permit for public employees or that we permit for postal workers.

124 Cong. Rec. H8467 (daily ed. Aug. 11, 1978); Legislative History at 854-6.

For other statements on this subject in the legislative history, see statement of Congressman Clay, 124 Cong. Rec. E4509 (daily ed. Aug. 10, 1978), Legislative History at 844-845; statement of Congressman Udall, 124 Cong. Rec. H8462-3 (daily ed. Aug. 11, 1978), Legislative History at 850-51; statement of Congressman Derwinski, 124 Cong. Rec. H9639 (daily ed. Sept. 13, 1978), Legislative History at 935; statement of Congressman Ford, 124 Cong. Rec. H9648-51 (daily ed. Sept. 13, 1978), Legislative History at 952-958; statement of Congressman Rousselot, 124 Cong. Rec. H9651-52 (daily ed. Sept. 13, 1978), Legislative History at 958-959; statement of Congressman Fisher, 124 Cong. Rec. H9668-69 (daily ed. Sept. 13, 1978), Legislative History at 964; Statement of Senator Sasser, 124 Cong. Rec. S14280-82 (daily ed. Aug. 24, 1978), Legislative History at 1014-1015.

See also S. REP. NO. 95-969, 95th Cong., 2nd Sess. 12-13 (1978), Legislative History at 749-750.

7/ Section 704 of the Civil Service Reform Act of 1978 provides as follows:

Sec. 704. (a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.

(b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated in accordance with prevailing rates and pay practices without regard to any provision of--

(A) chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph;
(B) subchapter IV of chapter 53 and subchapter V of chapter 55 of title 5, United States Code; or
(C) any rule, regulation, decision, or order relating to rates of pay or pay practices under subchapter IV of chapter 53 or subchapter V of chapter 55 of title 5, United States Code.

8/ Pub. L. No. 92-392, § 9(b), provides as follows:

Sec. 9. (b) The amendments made by this Act shall not be construed to--
(1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees;

> (2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act for the renewal, extension, modification, or improvement of the provisions of such contract or for the replacement of such contract with a new contract; or
>
> (3) nullify, change, or otherwise affect in any way after such date of enactment any agreement, arrangement, or understanding in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, or the replacement of such contract with a new contract, after such date.

9/ See A Policy for Employee-Management Cooperation in the Federal Service, Report of the President's Task Force on Employee-Management Relations in the Federal Service (November 30, 1961), Legislative History at 1177, 1200-01.

The Report stated as follows:

> It must be recognized that a major and perhaps controlling distinction between the type of employee-management relations that have developed in private industry and those which are possible in the Federal service is that in the latter neither the employer nor his employees are free to bargain in the ordinary sense. The employees cannot strike, nor be represented by an organization affiliated with a group which asserts the right to strike against the Government. The employer in most parts of the Federal Government cannot negotiate on pay, hours of work or most fringe benefits. These are established by law.

Generally, negotiations may take place on policies in such areas of employee concern as working conditions, promotion standards, grievance procedures, safety, transfers, demotions, reductions in force, and other matters, consistent with merit system principles. It may be noted that in the public hearings held by the Task Force the representatives of the major employee organizations in the Federal Government made it clear that they are aware of these limitations and are quite content to negotiate within them.

In this matter as in most others, the Task Force is of the opinion that each department and agency of the Government should be left to determine its own practice. As a general rule, however, it may be said that a negotiable matter must be within administrative discretion, that is, it must be within the authority of the manager who is negotiating, and permissible by applicable laws, executive orders, and Administration and agency policy. In general, it will be in the area of working conditions and personnel policies and practices. It should not include matters concerning an agency's mission, its budget, its organization and assignment of personnel, or the technology of performing its work. Major reorganizations or changes in work methods, while not negotiable themselves, will involve implementation problems that may be negotiable such as promotion, demotion and training procedures.

Specific areas that might be included among subjects for consultation and collective negotiations include the work environment, supervisor-employee relations, work shifts and tours of duty, grievance procedures, career development policies, and where permitted by law the implementation of policies relative to rates of pay and job classification. This list is not, of course, all-inclusive, nor should it be expected that every agency will feel free to negotiate in all such areas.

10/ To the extent that a matter affecting conditions of employment is not specifically provided for by law and is not otherwise inconsistent with law and regulation it is within the agency's discretion. As the portion of the Report accompanying E.O. 10988 quoted above at note 9, indicates, such discretion has been subject to bargaining since the outset of the labor relations program in the Federal Government. The Federal Labor Relations Council consistently held that otherwise negotiable matters which were within an agency's discretion were subject to collective bargaining. *See*, *for example*, *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII*, 5 FLRC 250, 252 (1977). The Authority has similarly interpreted the Statute. *See*, *for example*, *National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 FLRA 748, 759-62 (1980). Consistent with this long-standing precedent in the Federal sector, the Authority has held that where matters relating to wages and fringe benefits are within an agency's discretion under law and regulation they are within the duty to bargain. *See* Section IV.A.3 of this decision; *Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina*, 12 FLRA 519 (1983).

11/ *See* *Library of Congress v. Federal Labor Relations Authority*, 699 F.2d 1280, 1285-6 (1983), in which the Court in analyzing the legislative history of the Statute noted that Congress intended the bargaining obligation to be construed broadly.

12/ 5 U.S.C. § 2105(c) provides:

> § 2105. *Employee*
>
> . . . .
>
> (c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of--

> (1) laws (other than subchapter IV of chapter 53 and sections 5550 and 7204 of this title) administered by the Office of Personnel Management; or
>
> (2) subchapter I of chapter 81 and section 7902 of this title.

This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities.

13/ In finding that this proposal is within the duty to bargain, we make no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Respondent

and Case No. 2-CA-40211

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the General Counsel to the attached Decision of the Administrative Law Judge. The Respondent filed an opposition to the General Counsel's exceptions. The issue is whether, as found by the Judge, the Respondent's refusal to bargain with the exclusive representative concerning the impact of one employee's reassignment violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute).

II. Background

The record reflects that the American Federation of Government Employees, AFL-CIO, is the exclusive representative of a consolidated nationwide unit of certain employees of the Respondent, including those of the Northeastern Program Service Center (the Center), and that the Charging Party acts as its agent at the Center. The Center is one of the main facilities for processing claims of Social Security beneficiaries. It is divided organizationally into seven processing sections, each consisting of several work modules and an Inquiry and Expediting (I&E) Unit. Prior to the reassignment giving rise to the complaint in this case, the I&E Unit in Section 3 employed, among others, three Search and Control (S&C) clerks. One of the S&C clerks was Selma Hirsch, who had been permanently reassigned to that position from the position of file clerk in a module on November 13, 1983. The record reveals that it was not necessary for Hirsch to receive training or to learn any new skills in order to perform satisfactorily in her new position. In December 1983, a separate reconsideration group was established at the Center which reduced certain of the work handled by the I&E Units. Based on this decrease in workload, Hirsch was designated on January 10, 1984, to be reassigned back to the file clerk position she previously held in one of the work modules, and the reassignment was effected on February 6, 1984. The record reflects that prior to the effectuation of the reassignment, the Respondent took the position, among other things, in response to the Charging Party's request to bargain, that the reassignment would result in no material change in the affected employee's duties.

III. Judge's Decision

The Judge noted that the Authority has previously held that "where an agency in exercising a management right under section 7106 of the Statute, changes conditions of employment of unit employees . . . the statutory duty to negotiate comes into play if the change results in an impact upon unit employees or such impact was reasonably foreseeable." [Footnote omitted.] U.S. Government Printing Office, 13 FLRA 203, 204-05 (1983). The Judge also referred to the Authority's decision in Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA 922 (1984), that "no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than *de minimis*."

The Judge found a violation of section 7116(a)(1) and (5) of the Statute based upon the Respondent's refusal to bargain upon request, concluding first that the request to bargain was made in a timely fashion and second that the reassignment of employee Selma Hirsch from the position of S&C clerk in the I&E Unit into the position of file clerk in one of the work modules within the same processing section constituted a change in working conditions which was more than *de minimis*. In reaching this latter conclusion, the Judge noted the differences in duties and tasks required in the two work units; the impact of Hirsch's reassignment on the two remaining I&E clerks; and the fact that while no differences in grade were involved, the line of progression had been from file clerk in a module to S&C clerk in the I&E Unit.

IV. Exceptions

The General Counsel's exceptions were limited to the Judge's failure to provide a status quo ante remedy and his failure to rule on the General Counsel's request for such a remedy. The Respondent opposed the General Counsel's exceptions.

V. Analysis

Based on the facts set out above, we conclude, contrary to the Judge, that the Respondent is not obligated to bargain with the Charging Party. Therefore, its refusal to do so did not violate section 7116(a)(1) and (5) of the Statute. In view of the importance of the issues involved in this case, particularly the extent of an agency's duty to bargain regarding changes in conditions of employment, the bases of our decision merit discussion.

A. The obligation to bargain regarding changes in conditions of employment.

The duty of bargain in good faith under the Statute "requires that a party meet its obligation to negotiate prior to making changes in established conditions of employment, during the term of a collective bargaining agreement, absent . . . a clear and unmistakable waiver of bargaining rights." Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). This obligation applies whenever management changes an established policy or past practice pertaining to conditions of employment whether or not the matter is covered by a provision in an existing collective bargaining agreement. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 5 FLRA 352 (1981); U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, 19 FLRA No. 40 (1985).

It is clear, however, in both the Federal and private sectors that certain management actions do not rise to a level which creates a bargaining obligation. Where the obligation to bargain extends to the impact and implementation of the change (or to procedures and appropriate arrangements where the exercise of management rights under section 7106 is involved), the relative significance of the change and the degree of its impact on bargaining unit employees have been relevant considerations under both Executive Order 11491 and the Statute.[1]

B. The use of a standard to identify changes which require bargaining and those which do not.

The use of a standard to distinguish between changes which require bargaining and those which do not is fully supported by the Statute and its purposes and policies. Section 7101 of the Statute reflects Congress' finding that collective bargaining is in the public interest, as well as the direction that the Statute be interpreted in a manner which is consistent with the requirement of an effective and efficient Government. In cases such as these, the Authority must accommodate Congress' provisions both for consultation and negotiation concerning working conditions of Federal employees, and for the effective and efficient operation of Government agencies through the exercise of management rights or through other actions required or permitted by law.

Further, section 7105(a)(1) requires the Authority to provide "leadership in establishing policies and guidance" relating to labor relations in the Federal sector. In fulfilling this responsibility, the Authority must take care that its adjudicative processes not be unnecessarily burdened with cases that do not serve to bring meaning and purpose to the Federal labor-management relations program. While we seek to ensure that the rights of agencies, unions, and employees under the Statute are protected in situtations involving changes in conditions of employment, we must also seek to discharge our responsibilities in a fashion that promotes meaningful bilateral negotiations. Interpreting the Statute to require bargaining over every single management action, no matter how slight the impact of that action, does not serve those aims. The limited scope of Federal sector bargaining caused by external laws, rules, and regulations also demands that the Authority not impose further limitations unless they are based on clear statutory authority and are buttressed by sound policy considerations.

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[1] The National Labor Relations Board similarly makes a threshold determination in deciding whether an employer has a duty to bargain. Where the change made by the employer is not a "material, substantial or significant change" from past practice, the Board has found that the employer has no statutory duty to bargain over the change. See Peerless Food Products, Inc., 236 NLRB 161 (1978). The Board also considers the utilization of its resources in the processing of unfair labor practice cases. See Jimmy Wakely Show, 202 NLRB 620 (1973).

C. Previous standards used to identify changes which require bargaining.

Two standards have been used to date to identify those changes which require bargaining. The old standard required a "substantial" impact. See, for example, Social Security Administration, Bureau of Hearings and Appeals, 2 FLRA 238 (1979). The more recent standard required that the impact be more than de minimis.2/ In discussing the de minimis standard in Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA No. 101 (1985), the Authority identified a number of factors to be considered in determining whether a particular change in conditions of employment was more than de minimis. The factors identified were (1) the nature of the change (for example, the extent of the change in work duties, location, office space, hours, loss of benefits or wages, and the like); (2) the duration and frequency of the change (that is, the temporary, recurring, or permanent nature of the change); (3) the number of employees affected or foreseeably affected by the change; (4) the size of the bargaining unit; and (5) the extent to which the parties established, through negotiations or past practice, procedures and appropriate arrangements concerning analogous changes in the past.

D. The standard to be applied in this and future cases.

We have reassessed and modified the recent de minimis standard. In order to determine whether a change in conditions of employment requires bargaining in this and future cases, the pertinent facts and circumstances presented in each case will be carefully examined. In

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2/ The term de minimis is derived from the Latin phrase "De minimis non curat lex," which is translated to mean that the law does not care for, or take notice of, very small or trifling matters; the law does not concern itself about trifles. Black's Law Dictionary 388 (5th Ed. 1979).

examining the record, we will place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.

As to the number of employees involved, this factor will not be a controlling consideration. It will be applied primarily to expand rather than limit the number of situations where bargaining will be required. For example, we may find that a change does not require bargaining. However, a similar change involving hundreds of employees could, in appropriate circumstances, give rise to a bargaining obligation. The parties' bargaining history will be subject to similar limited application. As to the size of the bargaining unit, this factor will no longer be applied.

E. Application of the standard in this case.

Applying the above analysis and based on the facts and circumstances in this case, we conclude that the Respondent was under no obligation to bargain with the Union concerning implementation procedures or appropriate arrangements pertaining to the reassignment of the employee. While there was some change in the conditions of employment of the employee as a result of her reassignment from the clerical position in the Inquiry and Expediting (I&E) Unit back to the clerical position she had previously held, review of the relevant facts and circumstances establishes that the change did not give rise to a bargaining obligation. In reaching this result, we note the limited nature of the change involved, i.e., the reassignment of the employee from a position she had held for less than three months back to the position she had previously held, based on the operational needs of the Respondent. The employee's reassignment involved no loss in pay or grade, nor did it involve a change in her hours. Although the new position involved some changes in duties and tasks as noted by the Judge, the duties of the two positions are substantially similar. Moreover, the anticipated effect on the remaining S&C clerks due to Hirsch's reassignment should be minimal since the reassignment was directed as a result of a decrease in workload.

Accordingly, we conclude that the Respondent was not obligated to bargain with the Union in this matter and that by refusing to do so the Respondent did not violate section 7116(a)(1) and (5) of the Statute. Notwithstanding this determination, we believe that the collective bargaining relationship between the Agency and the Union in this case would be better effectuated by their timely and amicable efforts to meet, discuss and possibly resolve issues raised by the minor changes in conditions of employment.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record in this case, and adopts the Judge's findings and conclusions only to the extent that they are consistent with our decision. Therefore, we reverse the Judge's finding of a violation and shall order that the complaint be dismissed.3/

3/ In view of this disposition, we find it unnecessary to reach or pass upon the Judge's failure to order a *status quo ante* remedy under the circumstances.

ORDER

The complaint in Case No. 2-CA-40211 is dismissed.

Issued, Washington, D.C., December 9, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF HEALTH & HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Respondent

and

Case No. 2-CA-40211

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Charging Party

. . . .

Daniel H. Green, Esq.
Julian Bergman
For the Respondent

Jon R. Steen, Esq.
For the General Counsel

James Armet
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on April 30, 1984 by the Regional Director for the Federal Labor Relations Authority, Region II, a hearing was held before the undersigned on June 21, 1984 at New York, New York.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.*, (herein called the Statute). It was based on a charge filed on February 8, 1984 by American Federation of Government Employees, AFL-CIO, Local 1760 (herein called the Union) against the Department of Health and Human Services, Social Security Administration (herein called the Respondent).

The Complaint alleged, in substance, that on or about February 6, 1982[1] Respondent unilaterally changed working conditions by reassigning a search and control clerk at its Northeastern Program Service Center, and thereby reduced the staff in its Inquiry and Expedite unit; that such action was taken without notifying the Union and affording it an opportunity to bargain re the impact and implementation of such change.

Respondent's Answer, dated May 21, 1984, denied the foregoing allegation as well as the commission of any unfair labor practices.

All parties were represented at the hearing, each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.[2]

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the American Federation of Government Employees, AFL-CIO, has been the exclusive representative of a consolidated nationwide unit of certain employees of Respondent, including all nonsupervisory employees in the Northeastern Program Service Center with specified exclusions.[3]

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[1] At the hearing the Complaint was amended to change the year from 1982 to 1984.

[2] Subsequent to the hearing General Counsel filed a Motion to Strike certain portions of Respondent's brief as containing facts unsupported by the record. Respondent filed an opposition to said Motion. In its brief Respondent refers to: (a) a dismissal and appeal denial of another unfair labor practice charge involving the same parties; (b) the fact that James Armet, an individual with whom Union representative Warren Holton testified he spoke to on January 10, 1984, was on leave that date. Documents supporting such evidence are attached to Respondent's brief. Apart from the relevancy or determinative nature of such facts and material, the undersigned will not consider any evidence not included in the official record of the hearing. Only the testimony and exhibits adduced thereat are relied upon in the disposition of this case. The Motion is denied. See Internal Revenue Service, 16 FLRA No. 119.

[3] Respondent's Answer admits that (a) American Federation of Government Employees, AFL-CIO has delegated to the National Council of SSA Payment Centers the authority to act as its representative for collective

(continued)

2. At all times material herein Respondent and American Federation of Government Employees, AFL-CIO, have been parties to a collective bargaining agreement which covers the employees in the Northeastern Program Service Center. The said agreement provides, inter alia, as follows:

> ARTICLE 4
>
> Negotiations During the Term of the Agreement
>
> Section 1 - General
>
> The Administration will provide the Union reasonable advance notice prior to implementation of changes affecting conditions of employment subject to bargaining under 5 USC 71. Upon notice from the Administration of a proposed change, the designated union representative will notify the designated management representative of its desire to consult and/or negotiate on the change.
>
> The Union will submit written proposals if applicable within a reasonable period after notice of the proposed change. Bargaining will begin as soon as possible, and will not exceed ten (10) working days. All issues not resolved at that time may be referred to the Federal Service Impasses Panel for resolution under its rules.

3. The Northeastern Program Service Center is the main processing facility for claims of Social Security beneficiaries. There are seven processing sections, and each is divided into a group of modules and an Inquiry and Expediting Unit.

4. The Inquiry and Expediting (I&E) Unit handles the sensitive cases. For about five or six years, and prior to February, 1984, Section 3 of I&E employed five technicians, three Search and Control (S&C) Clerks,

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3/ (Footnote continued)

bargaining of Respondent's employees at the Northeastern Program Service Center, and the delegation has been recognized by Respondent; (b) American Federation of Government Employees, AFL-CIO, Local 1760 (the Union) has, at all times material herein, acted as agent of the Council for the purpose of collective bargaining for Respondent's employees at the Northeastern Program Service Center, and the agency relationship has been recognized by Respondent.

one secretary and one manager. The technicians did the actual work on the claims. S&C clerks prepared cases for processing and perform non-technical work thereon: preparing control cards for correspondence opinions, which involved finding folders and associating the material with the folders and then sending same to the processing staff; doing inventory[4] of cases; answering telephone inquiries; and locating files.

5. In 1983 there were three S&C clerks in I&E, 3. One of these retired on September 20 of that year. Jerry Lawrence, Section Manager, suggested to Oren Palmer, Deputy Section Manager, that the vacancy be filled by file clerk Selma Hirsch. It was discussed with Warren Holton, Union Vice-President, and they agreed that Hirsch be detailed to I&E 3 for thirty days so that her performance could be reviewed.

6. Hirsch was detailed to I&E 3 as a S&C clerk in October, 1983. On November 13, of that year she was formerly reassigned to that position since her performance was satisfactory. No training was required for her job, nor was it necessary that Hirsch learn any new skills.

7. In December, 1983 Respondent established a reconsideration group. The term "reconsideration", as it applies to Respondent's workload, concerns instances where a beneficiary questions whether he receive payment or whether additional payment should be made. This work had been handled by the seven I&E units and the processing of those cases took 30-60 days. The reconsideration group was set up to simplify the process, and it was staffed from the modules with claims authorizers, benefits authorizers, typists, and module control clerks. The I&E units no longer handle reconsideration cases.

8. Several discussions took place during December, 1983 and January, 1984 between Deputy Section Manager Palmer and Union representative Holton.[5] In early December notification was given to Holton that it might be necessary to detail an S&C clerk out of the I&E section to the module. On December 12, 1983 Palmer discussed with Julian Bergman, Respondent's Labor Relations Specialist, the fact that, due to a decrease in workload in the I&E unit, management might want to reassign an S&C clerk out of the I&E section. Bergman suggested he speak to the Union.

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[4] Each week the I&E unit receives a computer print-out of all cases recorded into I&E. This is broken down into cases (1) in actual processing, (2) missing, or which I&E was awaiting; (3) in a payment holding file, where payment is being made thereon. Inventories are done weekly with a record being made of the location of each folder.

[5] A credibility issue is posed since there is a conflict of testimony in respect to the dates of the conversations and the content thereof. The facts set forth in that regard represent the credited version of such discussions.

9. On December 19, 1983 Palmer talked to Holton and mentioned that he anticipated reassigning an S&C clerk out of I&E 3 due to the decreased workload thereat. Holton stated that such a move could have office-wide implications; that he would like to review it with other union officials and get back to Palmer. On or about January 3, 1984[6] Palmer mentioned to Holton that the latter had not "gotten back" to him re the reassignment of a S&C clerk. However, Holton indicated he had nothing to report at that time. Thereafter, on January 10,[7] Palmer approached Holton and stated he was reassigning S&C clerk Selma Hirsch out of I&E; that he would advise him later as to the date and location.

10. In a memorandum dated January 12, Holton notified Palmer that the Union demanded negotiation re the impact and implementation of its decision to reassign a S&C clerk from the I&E staff to a module. The Union representative also requested certain information re the work receipts and service computation dates of the incumbent S&C clerks in I&E Unit 3.[8] Holton also stated that the Union would submit its proposals after receipt of the requested data.

11. Palmer sent a memorandum dated January 12 to Holton stating that the Union representative was advised during the week of December 19, 1983 of the decision to reassign an I&E Control Clerk to a module in Section 3; that it is Palmer's decision there is no obligation to negotiate with the Union. The memorandum recited that Holton failed to submit timely proposals so that negotiations could be conducted within 10 working days (Article 4, Section 1 of the agreement); and that there is no material change in the working conditions of the employee to be reassigned.

12. In a memorandum dated January 13 from Holton to Palmer the Union representative stated that the Deputy Manager discussed detailing a S&C clerk temporarily rather than making a permanent reassignment. Holton commented that timely notice of a proposed change was not given as

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[6] Unless otherwise indicated, all dates hereinafter mentioned occur in 1984.

[7] Palmer testified it was an established practice that, in respect to any proposals, management had to be contacted within 10 days from the date the union is notified thereof. Apart from Palmer's statement in that regard, the record contains no evidence of such a practice or its duration. The undersigned concludes there is insufficient evidence to support an established practice that the union must respond to Respondent within 10 days of management's proposals.

[8] Although the charge herein alleges a violation of the Statute based on a failure by Respondent to provide information requested by the Union, no such allegation was made a part of the Complaint.

required by Article 4, Section 4 of the written agreement;[9] and that, although management may not be required to bargain re the decision to reassign an employee, it is obligated to bargain re the impact and implementation thereof. Holton repeated his former demand to negotiate in that regard as well as for the production of the requested information.[10]

13. Holton sent another memorandum to Palmer, which was dated January 27, referring to the one dated January 13 that he sent the Deputy Manager, wherein the Union requested negotiation re the impact and implementation of the transfer of the S&C clerk to the module. He requested a reply to the demand for such negotiation.

14. Under date of January 30 Palmer sent a memorandum to Holton reiterating management's position as set forth in its January 12 memorandum to the Union. Palmer declared that timely notification of the decision to reassign an employee from the I&E staff had been furnished Holton even though no material change in duties resulted from the reassignment; that, nevertheless, Holton did not submit timely proposals.

15. In reply to Palmer's January 30 memorandum, Holton sent another memorandum to management on January 30. In addition to repeating the Union's position re the obligation of Respondent to bargain as to impact and implementation, Holton submitted a proposal that management solicit volunteers when making a reassignment. He also suggested that service computation date should govern if there are volunteers to determine which employee should be reassigned.

16. In another memorandum to Holton, dated February 1, Palmer reaffirmed management's contention that the Union did not pursue the matter in a timely fashion; that no material change occurred in condition of employment; and that management had no duty to bargain.

17. Selma Hirsch was reassigned from I&E 3 as a search and control clerk to a file clerk on February 6 in Module 18.

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[9] This particular provision recites that notice of proposed changes affecting one Region or Program Service Center will be given the union and upon request negotiated at that level; that management will provide the designated union representative with timely notice of proposed management initiated changes.

[10] Palmer testified he did not receive this memorandum, which was left on his desk, until January 27; that he so noted it on the document on that date. In view of the ultimate findings re the timeliness of the January 12 request to bargain by the Union, the fact that the January 13 memo from Holton may not have been brought to Palmer's attention till January 27 is not deemed determinative as urged by Respondent.

18. Prior to the reassignment of Hirsch there were three S&C clerks in I&E, Section 3. Each control clerk governed two modules, and after February 6 the remaining two control clerks each covered three modules. All of the duties of these clerks, i.e., associating correspondence to files, taking inventory, preparing cases for processing, locating files, and handling telephone inquiries, were performed for an additional module. Since each module contained 150 filing cabinets, the two control clerks searched 150 more cabinets. S&C Clerk, Lee Harris in I&E 3, testified he had to work a little more overtime and his backlog is higher.[11] Further, that the two control clerks cannot take lunch and other breaks together since one of them must be on duty.

19. Records facts show that while the S&C clerk in I&E and the file clerk in modules do perform similar duties, there are some differences in their tasks. Critical and sensitive cases are handled by control clerks in I&E, while the file clerk in a module gets a full range of incoming "receipts". There is more physical effort required of the file clerk since the latter must lift and deliver a large number of folders compared to a few by the control clerk. As many as 50-100 folders are carried by the file clerk who may use a wagon to wheel them away. The S&C clerk in I&E carries folders to the modules. He brings critical cases to the manager and leaves the file cases on the receipt table in the module. The "racks"[12] will then file the folders away.

The control clerks generally visited all the floors in two buildings, whereas the file clerk was confined to the work area within the module. To some extent there is less supervision in the I&E unit. Only one supervisor is assigned thereat and he is not present most of the time, whereas there are three supervisors in the module who supervise the file clerks.

Although there is no pay differential between the control clerk and file clerk positions, the usual line of progression is from the file clerk in the module to the S&C clerk in I&E. Both Hirsch and S&C Clerk Lee Harris testified they considered the transfer to file clerk from the control clerk in I&E to be a demotion.

Conclusions

A determination as to whether Respondent violated the Statute by failing and refusing to negotiate the impact and implementation of the reassignment of employee Selma Hirsch turns on the resolution of two issues: (1) whether the Union's request to negotiate in that regard was timely so as to impose a duty upon Respondent to bargain; (2) assuming arguendo the Union's request was timely made, whether the reassignment resulted in a minimal impact so as to warrant the conclusion that no violation of Section 7116(a)(1) and (8) be found herein.

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[11] Harris could not testify as to whether the number of cases increased, but stated he was doing more work than previously. Palmer testified the workload had reduced about 33% in the I&E Unit. The work receipts in said unit do show a decrease in December, 1983 and January, 1984 as contrasted with previous months. (G.C. Exhibit 9).

[12] This term refers to a file clerk who files the folders.

(1) Respondent contends that the Union virtually slept on its rights and thus waived any right to insist upon bargaining re the reassignment of Selma Hirsch. It insists that the Union, which was notified by management on December 19, 1983 of the proposed transfer to this employee, waited two weeks before requesting bargaining; that union representative Holton also waited two weeks (January 13, 1984 until January 27, 1984) for an answer from management to his request. Such a delay, it is argued, is unreasonable and flouts Article 4, Section 1 of the parties' collective bargaining agreement.

In addition to imposing a duty upon an agency to provide a union with adequate notice prior to exercising a reserved management right, the Authority has declared that the union must submit its bargaining request within a reasonable time after receiving such notification. United States Department of Defense, Department of the Army, Headquarters, Fort Sam Houston, Texas, 8 FLRA No. 112. Where a union fails to request bargaining until after the change is implemented, such request is untimely and an employer may not be deemed to have refused to bargain unlawfully. Department of the Army, U.S. Military Academy, West Point, New York, A/SLMR No. 1138, 8 A/SLMR 1163. Further, if a union is notified that a change will occur in 10 days, its submission of proposals at the last minute before an agency implements said procedures has been held to constitute an untimely request to bargain. Department of the Treasury, U.S. Customs Service, Region I (Boston, Massachusetts), 16 FLRA No. 97. See also, Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 960, 8 A/SLMR 33.

In the case at bar I am not persuaded that the Union's request to bargain may properly be deemed untimely. While the Respondent dates its notification re the intended reassignment of Hirsch as of December 19, 1983, the record does not reflect that such notice was absolute or definitive in nature. Thus, Palmer on that date told Holton that management anticipated reassigning S&C clerk out of I&E 3. The Deputy Section Manager did not specify a particular date when the reassignment would occur. Further, he made no mention at that time of the unit or group to which the S&C clerk would be reassigned, nor was mention made of the particular control clerk to be transfered. Under the circumstances, the Union was not provided with much more than a general expectation that management would probably move a S&C clerk out of the I&E unit. It was not until January 10 that Palmer notified Holton that management would be reassigning control clerk Selma Hirsch out of I&E. Moreover, Palmer stated he would advise Holton later as to the date and location. It scarcely behooves Respondent to contend that proper notification was given the Union prior to January 10 re the reassignment. Accordingly, the request to bargain made by Holton on January 12 was, in my opinion, timely in nature. Cf. General Services Administration, 15 FLRA No. 6.[13]

(2) While an agency may not be required to negotiate a decision reserved to it as a management right under Section 7106(a) of the Statute, it may be called upon to bargain as to the impact and implementation thereof. Prior to 1983 the test applied in the public sector involved a determination as to whether such impact resulting from the change was "substantial" in nature. Then in U.S. Government Printing Office, 13 FLRA No. 39, the Authority rejected the yardstick of "substantiality" in respect to impact of a change in condition of employment. It concluded therein that the duty to negotiate comes into play where the change results in an impact which is reasonably foreseeable. However, no such duty is imposed where the foreseeable impact is de minimis in nature. See also Department of Health and Human Services, Social Security Administration, Chicago, Illinois, 15 FLRA No. 174.

In the case at bar Respondent insists that the reassignment of Selma Hirsch constituted a minimal change in her working conditions and resulted in no adverse effect upon unit employees. I do not agree. Although it is true that both the S&C clerk and the module file clerk both have similar duties and tasks to perform, there are some differences in their working conditions. The record reflects that the file clerks must exert much more physical effort than that which is required of the control clerk. In her new position Hirsch is required to use a wagon to load folders, and she may lift and deliver 50-100 folders, whereas as a control clerk in the I&E unit very few folders were carried by her each day to the module. In her former position Hirsch and the other S&C clerks handled only sensitive cases, or those which were given special consideration as critical matters. The file clerks, including Hirsch in her reassigned job at the module, handle a full range of incoming receipts involving all types of cases. S&C clerks in the I&E unit have one supervisor whereas the module clerks have three managers. The control clerk has a telephone on her desk. If the District Office called for a folder, the said clerk could go into the module and procure it. The file clerk has no phone on her desk and a question to her is directed to somebody else. The file clerk is confined to the work area in that module while the S&C clerk visits all floors in two buildings.

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[13] The failure by Holton to make any proposals to Palmer on January 3 does not, as Respondent implies, demonstrate a disinterest in the reassignment. Neither does it constitute a waiver of the right to request bargaining on the matter. Long Beach Naval Shipyard, Long Beach, California, 17 FLRA No. 76. At that date the notification to the Union was anticipatory in nature, and I cannot fault the Union for not pursuing negotiations. See Internal Revenue Service, 16 FLRA No. 205. Moreover, a waiver must be, as the Authority has held, clear and unmistakable. Scott Air Force Base, Illinois, 5 FLRA 9.

In respect to the S&C clerks in the I&E unit, record facts show that prior to February, 1984 each of the three clerks covered two modules in associating correspondence, preparing cases for processing, locating and delivering files. Since the reassignment of Hirsch each of the two control clerks covers three modules. Further, each such clerk must take lunch or a break alone since it is necessary that one of them remain on duty during working hours. Previously two of those individuals could go together at such times. Note is also taken that the line of progression has always been from file clerk position to the S&C clerk in I&E.

In sum, I conclude that the reassignment of Selma Hirsch from the I&E unit to the module as a file clerk resulted in a change in working conditions. Moreover, I am persuaded, based on the record herein, that the changes were substantial enough so that the impact may properly be termed as more than *de minimis*. Cf. *Department of Health and Human Services, Social Security Administration, Chicago, Illinois*, *supra*. Accordingly, since Respondent failed and refused to bargain as to the impact and implementation of such reassignment - after a timely request by the Union herein - I also conclude Respondent has violated Section 7116(a)(1) and (5) of the Statute.

Accordingly, and based on the foregoing, it is recommended that the Authority issue the following:

ORDER

Pursuant to Section 7118 of the Statute and Section 2423.29 of the Rules and Regulations, it is hereby ordered that the Department of Health and Human Services, Social Security Administration, shall:

1. Cease and desist from:

   (a) Reassigning any employees represented exclusively by American Federation of Government Employees, AFL-CIO, Local 1760, without first notifying the exclusive representative and affording it an opportunity to bargain with respect to the procedures which management will observe in implementing such reassignment and concerning appropriate arrangements for employees adversely affected thereby.

   (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Notify and bargain in good faith with American Federation of Government Employees, AFL-CIO, Local 1760, upon request, with respect to the procedures which management will observe in implementing a reassignment of employees, and concerning the appropriate arrangements for employees adversely affected thereby.

(b) Upon request, bargain in good faith with American Federation of Government Employees, AFL-CIO, Local 1760, concerning the appropriate arrangements for employees adversely affected by the reassignment of employee Selma Hirsch from the Inquiry and Expediting Unit, Section 3 to Module 18 at the Northeastern Program Service Center.

(c) Post at its facilities at the Northeastern Program Service Center, Flushing, New York, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, or his designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: May 20, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT reassign any employee represented exclusively by American Federation of Government Employees, AFL-CIO, Local 1760, without first notifying the exclusive representative and affording it an opportunity to bargain with respect to the procedures which management will observe in implementing such reassignment and concerning appropriate arrangements for employees adversely affected thereby.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL notify and bargain in good faith with American Federation of Government Employees, AFL-CIO, Local 1760, upon request, with respect to the procedures which management will observe in implementing a reassignment of employees, and concerning the appropriate arrangements for employees adversely affected thereby.

WE WILL, upon request, bargain in good faith with American Federation of Government Employees, AFL-CIO, Local 1760, concerning the appropriate arrangements for employees adversely affected by the reassignment of employee Selma Hirsch from the Inquiry and Expediting Unit, Section 3 to Module 18 at the Northeastern Program Service Center.

____
(Agency or Activity)

Dated: ____________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278 and whose telephone number is: (212) 264-4934.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 17, AFL-CIO

Union

and

Case No. O-AR-1154

VETERANS ADMINISTRATION
CENTRAL OFFICE

Agency

DECISION

I. Statement of the Case

This matter is before the Authority on exceptions to the award of Arbitrator Roger P. Kaplan filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations.

II. Background and Arbitrator's Award

The grievance protested the Agency's failure to give the grievant a career ladder promotion to grade GS-11. According to the Arbitrator, the grievant's immediate supervisor was advised by the personnel office that the grievant would be eligible for promotion on July 7, 1985. The supervisor sent a memorandum to the next level of management recommending the grievant for promotion, and also informed the grievant in writing of his intention to recommend her for promotion. The grievant was not promoted because higher level management contended that she had not performed higher grade duties. The immediate supervisor had stated that the grievant had satisfactorily performed and was able to perform the full range of GS-11 duties.

The matter was submitted to arbitration. The Arbitrator framed the issue as whether the Agency violated Article 34, Section 17B of the collective bargaining agreement by its failure to promote the grievant on July 7, 1985. That provision of the agreement contained the requirements for career ladder promotion. The Arbitrator noted that the parties disagreed only on whether the grievant met the first requirement which concerned "[t]he selectee's demonstration of the ability to perform the duties of the next higher grade to the satisfaction of the supervisor." He also noted that the parties agreed at the hearing that if he found a violation of the agreement, the grievant would be entitled to retroactive promotion from July 7, 1985 to January 18, 1986 when she was promoted to GS-11.

The Arbitrator found that the immediate supervisor's testimony concerning the grievant's satisfactory performance of GS-11 duties outweighed the claim of higher management that she had not performed satisfactorily. Therefore, he ruled that the grievant met the first requirement of the agreement. He rejected the Agency's contention that the immediate or first level supervisor only can recommend that promotions be made and he ruled that under his interpretation of the agreement, the only person to make the determination of ability to perform at the next higher level was the immediate supervisor. The Arbitrator ruled that the grievant met the requirements of Article 34, Section 17B of the agreement and that the Agency violated those requirements by not promoting her. He sustained the grievance and awarded the grievant a retroactive promotion and back pay from July 7, 1985 to January 18, 1986.

III. First Exception

A. Contentions

The Agency contends that the award violates management's right to select under section 7106(a)(2)(C) of the Statute because it fails to make the required connection between improper Agency action and the failure of the grievant to be promoted. The Agency contends that the Arbitrator did not make a finding that the level of management having authority to promote the grievant would have approved and made the promotion.

B. Analysis and Conclusion

The Agency's first exception does not provide a basis for finding the award deficient. As the Agency correctly noted, the Authority has held that management's right to make selections under section 7106(a)(2)(C) of the Statute may be constrained and an agency ordered to select a particular employee for promotion only if the arbitrator finds that the employee was affected by an improper agency action that directly resulted in the failure of the employee to be promoted. U.S. Department of Commerce, Patent and Trademark Office and the Patent Office Professional Association, 21 FLRA No. 52 (1986). The Authority has also held with regard to section 7106(a)(2)(C), that a decision to promote an employee to the next grade in a career ladder position does not constitute a selection for appointment within the meaning of that section but is merely a "ministerial act" implementing a prior decision to select an employee for appointment. National Treasury Employees Union and NTEU Chapter 72 and Internal Revenue Service, Austin Service Center, 11 FLRA 271 (1983) (Proposal 2). In this case, the grievant was placed in a career ladder position with promotion governed by the provisions of Article 34, Section 17B of the agreement. The Arbitrator interpreted the agreement and found that the immediate supervisor was the proper person to evaluate the grievant's ability to perform at a higher grade. He concluded that the requirements for promotion were met and found that the Agency violated the agreement by failing to promote her. Thus, contrary to the Agency's contentions, the Arbitrator made the findings necessary to support his award. The Agency's exception merely constitutes disagreement with the Arbitrator's interpretation and application of the collective bargaining agreement which provides no basis for finding an award deficient. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, 2 FLRA 432, 438 (1980).

IV. Second Exception

A. Contentions

In its second exception, the Agency contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because it does not make the required connection between improper Agency action and failure to select the grievant for promotion. The Agency maintains that the Arbitrator did not expressly find that the Agency's unwarranted action directly resulted in the failure of the grievant to be promoted.

B. Analysis and Conclusion

The Agency fails to show that the award is contrary to the Back Pay Act. The Authority has consistently held that in order for an award of retroactive promotion and backpay to be authorized under the Back Pay Act, there must be not only a determination that the aggrieved employee was affected by an unjustified or unwarranted personnel action but also a determination that such action directly resulted in the denial of a promotion to the grievant. *American Federation of Government Employees, Local 3553, AFL-CIO and Veterans Administration Medical Center, New Orleans, Louisiana*, 18 FLRA No. 65 (1985). The Arbitrator found that the grievant met the agreement requirements for promotion and that the Agency's failure to promote her violated the agreement. Having selected the grievant for a career ladder position the Agency was obligated to promote her to the next grade when she demonstrated "the ability to perform the duties of the next higher grade to the satisfaction of the supervisor." The Arbitrator found that the grievant made such a demonstration and he effectively found that she would have been promoted if the Agency had not refused to comply with the agreement. Further, as the Arbitrator states in his award, the parties stipulated that the proper remedy if the Arbitrator found a violation of the agreement would be a retroactive promotion. Under these circumstances we find that the Arbitrator made a proper award under the Back Pay Act.

V. Decision

For the above reasons, the Agency's exceptions are denied.

Issued, Washington, D.C. December 10, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/case Release

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FLRA Questionnaire (Interested Participants in the Federal Service Labor-Management Relations Program)

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Interested Participants in the Federal Service
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In order to assist the Federal Labor Relations Authority and Federal Service Impasses Panel in determining its publication and research tool efforts, we are asking that you respond to the attached questionnaire. Your input will help assure that our resources are used most efficiently and provide the greatest possible benefit to practitioners in the program.

Please feel free to expand your comments, using additional pages if necessary. Responses by February 20, 1987 are requested. As many persons who wish to do so may submit responses to this questionnaire. Recipients are urged to distribute copies throughout their organization.

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6. Do you rely on FLRA publications to research Authority case law?

7. Check which of the below-listed research tools you have access to:

____ Department of Defense Index & Digest
____ Federal Labor Relations Reporter
____ FEDLINK
____ FLITE
____ Government Employee Relations Reporters
____ LEXIS
____ Personnelizer (Information Handling Service, Inc.)
____ Westlaw

8. Describe research tools which FLRA should make available.

9. Check which of the below-listed publications you wish continued and what use you make of them. How could they be improved upon?

Comments

____Guide to Federal Service Labor-Management Relations Statute
( )Training ( )Research

____Federal Service Labor-Management Relations Statute (8-1/2 x 11)
( )Training ( )Research

____Federal Service Labor-Management Relations Statute (pocket size)
( )Training ( )Research

____FSIP Subject-Matter Index and Table of Cases
( )Training ( )Research

____FSIP Press Releases
( )Training ( )Research

____Synopsis of the Panel's Role
( )Training ( )Research

Comments

____A Guide to the Dispute Resolution Procedures Used by the Federal Service Impasses Panel
( )Training ( )Research

____A Guide to Hearing Procedures of the Federal Service Impasses Panel
( )Training ( )Research

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1) An index listing all Authority Orders sorted by the Authority decision number (and showing the outcome, the OALJ decision and outcome, and the OGC case number);
2) An index listing all cases where the OALJ recommended decisions were adopted by the Authority (showing the outcome, the OALJ recommended decision number, and the OGC case number);
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NUMBER 410 REPORT OF CASE DECISIONS December 15, 1986

NEGOTIABILITY CASES

24 FLRA No. 45 (December 12, 1986)

National Federation of Federal Employees and General Services Administration, Case No. O-NG-1109

24 FLRA No. 49 (December 15, 1986)

American Federation of State, County and Municipal Employees, Local 3097, Case No. O-NG-1100

24 FLRA No. 50 (December 15, 1986)

American Federation of Government Employees, AFL-CIO, Local 1501 and Department of Health and Human Services, Social Security Administration Baltimore, Maryland, Case No. O-NG-830

24 FLRA No. 51 (December 15, 1986)

American Federation of Government Employees, AFL-CIO, Local 997 and Department of the Air Force, Maxwell Air Force Base, Alabama, Case No. O-NG-777

24 FLRA No. 52 (December 15, 1986)

National Treasury Employees Union and Department of Energy, Case No. O-NG-983

Y 3.F 31/21-3:

ARBITRATION CASES

24 FLRA No. 44 (December 11, 1986)

U.S. Department of Housing and Urban Development and American Federation of Government Employees, AFL-CIO, Local 476 (Ross, Arbitrator), 0-AR-1259

24 FLRA No. 46 (December 15, 1986)

U.S. Department of Labor and Local 12, American Federation of Government Employees (Barnett, Arbitrator), Case No. 0-AR-1119

24 FLRA No. 47 (December 15, 1986)

U.S. Department of Housing and Urban Development and American Federation of Government Employees, Local No. 3412 (Goodman, Arbitrator), Case No. 0-AR-1124

24 FLRA No. 48 (December 15, 1986)

Veterans Administration and American Federation of Government Employees, Local 2798 (Pritzker, Arbitrator), Case No. 0-AR-1021

Federal Labor Relations Authority

24 FLRA No. 44

HUD and AFGE, Local 476 (Ross, Arbitrator), Case No. 0-AR-1259 (Decided December 11, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION AWARDS, PROCEDURE	7122(a) and (b)

ARBITRATION AWARDS, PROCEDURE
  TIMELINESS
    WRONG FILING LOCATION
      AT THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES CODE
  CIVIL SERVICE MISCELLANEOUS AMENDMENTS ACT OF 1983
    SECTION 4

DIGEST NOTES

The Authority dismissed the agency exceptions as untimely filed under section 7122(b). Section 7122(b) of the Statute as amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, 4, 98 Stat. 47, 48(1984)) requires that exceptions to arbitration awards be filed with the Authority within 30 days from the date the award is served on the filing party. The union properly identified the Authority as the addressee on the envelope containing the exceptions, but the remainder of the address used on the envelope was that of the national office of the National Labor Relations Board. Although the NLRB received the exceptions within the 30-day period and immediately mailed them to the Authority, the Authority did not receive them until after the required filing period.

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Federal Labor Relations Authority

24 FLRA No. 45

NFFE and GSA, Case No. 0-NG-1109 (Decided December 12, 1986)

SUBJECT MATTER INDEX ENTRIES

- CODE OF FEDERAL REGULATIONS
  - 41 C.F.R. 201-38.007
- COMPTROLLER GENERAL LETTERS
  - B-220104 (AUGUST 4, 1986)
- FACILITIES, EQUIPMENT AND SERVICES
  - OFFICIAL BUSINESS
    - ANALYSIS OF OFFICIAL GOVERNMENT BUSINESS
  - TELEPHONE
    - LIMITED TO OFFICIAL BUSINESS
      - LABOR-MANAGEMENT RELATIONS ACTIVITIES BY UNIONS
- UNION RIGHTS
  - OFFICIAL BUSINESS RE LABOR-MANAGEMENT RELATIONS
    - ANALYSIS OF
- UNITED STATES CODE
  - 5 U.S.C. 5701 *ET SEQ*.[TRAVEL EXPENSE ACT]
  - 31 U.S.C. 1301
  - 31 U.S.C. 1348(b)

STATUTE

7101
7105(a)(2)(E)
7106(b)(1)
7117
7131(b)

DIGEST NOTES

Two proposals are negotiable that would provide local union officers with telephones that they could use for labor-management relations but which excludes the use of the phones for internal union business. Neither 31 U.S.C. sections 1301, 1348(b) nor 41 C.F.R. section 201-38.007, cited by the agency as precluding the use of telephones by union officials, specifically define the terms "official business" or "official government business" to which the use of government telephones is restricted. The terms have been construed as requiring a determination that the purpose of the use of the government telephone is in the interest of the United States. [Comptroller General Decision No. B-220104, Aug. 4, 1986]. Section 7101 of the Statute sets forth Congress's finding that labor organizations and collective bargaining are in the public interest.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 46

Dep't of Labor and Local 12, AFGE (Barnett, Arbitrator), Case No. 0-AR-1119 (Decided December 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- ARBITRABILITY
  - CLASSIFICATION OF A POSITION
    - CAREER LADDER PROMOTIONS
- ARBITRATION AWARDS, REMEDIES ORDERED BY ARBITRATORS
  - RETROACTIVE PERMANENT PROMOTION WITH BACKPAY
- ARBITRATION AWARDS, REVIEW OF, EXCEPTIONS ASSERTED IN APPEAL
  - AWARD CONTRARY TO APPLICABLE LAW
    - 5 U.S.C. 5596 [BACK PAY ACT]
    - 5 U.S.C. 5101 et seq. [CLASSIFICATION ACT]
  - AWARD CONTRARY TO APPLICABLE RULE OR REGULATION
    - FPM CHAPTER 511
  - AWARD CONTRARY TO THE FSLMR STATUTE
    - 7106(a)
    - 7121(c)(5)
  - AWARD FAILS TO DRAW ITS ESSENCE FROM THE AGREEMENT
  - AWARD BASED ON NONFACT
- ARBITRATION AWARDS, REVIEW OF, NO BASIS FOR REVIEW
  - DISAGREEMENT WITH ARB'S INTERPRETATION OR APPLICATION OF AGREEMENT
  - DISAGREEMENT WITH ARBITRATOR'S REASONING AND CONCLUSIONS
  - DISAGREEMENT WITH ARBITRATOR'S FINDINGS OF FACT
- FEDERAL PERSONNEL MANUAL
  - CHAPTER 511
- POSITION CLASSIFICATION
  - ARBITRATION AWARDS
    - FALSIFY POSITION DESCRIPTION - ALLEGED EFFECT OF AWARD
- PROMOTION
  - CAREER-LADDER PROMOTION
    - FALSIFICATION OF PD - ALLEGED EFFECT OF AWARD
    - PROMOTION DOES NOT CONCERN THE CLASSIFICATION OF A POSITION
- UNITED STATES CODE
  - 5 U.S.C. 5101 [CLASSIFICATION ACT]
  - 5 U.S.C. 5596 [BACK PAY ACT]

STATUTE

7106(a)
7121(c)(5)
7122(a)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

The grievance in this case concerns the failure of the four grievants to be given a career ladder promotion to GS-11 after the grievants had met the time-in-grade requirements for promotion and, in the judgment of their supervisors, had demonstrated the ability to perform at the GS-11 level. The arbitrator determined that the grievance was arbitrable. On the merits, the arbitrator rejected the agency's position that the grievants were not promoted because sufficient work at the GS-11 level was not available and found that the failure to promote was arbitrary and capricious and in violation of the parties' agreement. As her award, the arbitrator ordered the grievants be retroactively promoted with backpay.

In its first exception, the agency alleged that the award was not arbitrable because it concerned the classification of a position within the meaning of section 7121(c)(5). The Authority held that a grievance and an arbitration award which pertain to whether a grievant is entitled to a career-ladder promotion do not concern the classification of any position within the meaning of section 7121(c)(5).

In its second exception, the agency contended that the award was contrary to the Back Pay Act, 5 U.S.C. 5596. The Authority found that the arbitrator made all the findings necessary to her award of a retroactive promotion with backpay and that the agency failed to establish that the award was contrary to the Back Pay Act. Furthermore, the agency's contention that the arbitrator's findings are not supported constituted nothing more than disagreement with the arbitrator's interpretation and applications of the collective bargaining agreement and with her findings of fact and her reasoning and conclusions. Such disagreement provides no basis for finding the award deficient.

In its third exception, the agency contended that the award was contrary to the Classification Act, 5 U.S.C. section 5101 _et seq_., and classification regulations, FPM Chapter 511, or is contrary to section 7106(a) of the Statute. The agency claimed that there was a lack of work at the GS-11 to which the grievants would be promoted. Consequently, the agency asserted that as ordered, the award violated the Act and the FPM because it would require the grievant's supervisors to falsify the certification that the position description of the GS-11 position accurately reflects the duties to be performed by the grievants. However, the arbitrator specifically addressed in her award the lack of work issue at the GS-11 level. She found that even if the grievants' supervisors had a good-faith belief as to the lack of work, their failure to promote the grievants was still arbitrary. Moreover, the arbitrator separately found that there was not any lack of work at the GS-11 level and that the supervisors were instead motivated by subjective and unsupported fears about the climate for promotion.

In its fourth exception, the agency contended that the award does not draw its essence from the collective bargaining agreement. The Authority held that this exception clearly constituted nothing more than disagreement with the arbitrator's interpretation and application of the parties' collective bargaining agreement and her reasoning and conclusions in reaching her award, which provides no basis for finding an award deficient.

In its fifth exception, the agency contended that the award was based on a nonfact. The agency maintained that the arbitrator's finding that the grievants' supervisors promoted other GS-9 employees in the career ladder both shortly before and after the grievants became eligible for promotion was erroneous and that therefore the award was deficient. The Authority held that the agency failed to establish that the award was deficient. In order for an award to be found deficient on this ground, it must be established that the alleged "nonfact" involved a fact that was objectively ascertained, was the central fact underlying the award, and was concededly erroneous and that but for the arbitrator's misapprehension, the arbitrator would have reached a different result. But the arbitrator primarily found that the supervisors were motivated by fears about the general climate for promotions and that such fears were subjective and unsupported. Thus, it is not established, even if the cited statement of the arbitrator were concededly erroneous, that this is the fact on which the award is based and that but for the arbitrator's misapprehension, the arbitrator would have reached a different result.

work, their failure to promote the grievants was [illegible] arbitrary. Moreover, the arbitrator apparently found that there was not any lack of work at the GS-11 level and that the supervisors were instead motivated by subjective and unsupported fears about the grievants for promotion.

In its fourth exception, the agency contended that the award does not draw its essence from the collective bargaining agreement. The Authority held that this exception simply constituted nothing more than disagreement with the arbitrator's interpretation and application of the parties' collective bargaining agreement and his reasoning and conclusions in reaching his award, which provides no basis for finding an award deficient.

In its fifth exception, the agency contended that the award was based on a nonfact. The agency maintained that the arbitrator's finding [illegible] The Authority held that the agency failed to establish that the award was based on a nonfact. In order for an award to be found deficient on this ground, it must be established that the central fact underlying the award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. [illegible]

Federal Labor Relations Authority

24 FLRA No. 47

HUD and AFGE, Local No. 3412
(Goodman, Arbitrator), Case
No. 0-AR-1124 (Decided
December 15, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION	7122(a)

ARBITRATION
  AUTHORITY OF ARBITRATOR
    FORMULATION OF ISSUES IN THE ABSENCE OF A STIPULATION
    INTERPRETATION OF A SUBMISSION AGREEMENT
ARBITRATION AWARDS, MODIFIED OR SET ASIDE BY AUTHORITY
  ARBITRATOR EXCEEDED HIS AUTHORITY
    AFFIRMATIVE ORDER AFFECTING POSITIONS BEYOND GRIEVANCE SCOPE
      FAILING TO CONFINE REMEDY TO BARGAINING UNIT EMPLOYEES
ARBITRATION AWARDS, REMEDIES ORDERED BY ARBITRATORS
  FACILITIES, EQUIPMENT, SERVICES
    PROVIDE FREE-STANDING ACOUSTIC SCREENS
ARBITRATION AWARDS, REVIEW OF, EXCEPTIONS ASSERTED IN APPEAL
  ARBITRATOR EXCEEDED HIS AUTHORITY [BY:]
    DECIDING AN ISSUE NOT BEFORE HIM
    EXCEEDING HIS AUTHORITY UNDER THE PARTIES' AGREEMENT
    RENDERING AN AWARD THAT ENCOMPASSES NON-UNIT PERSONNEL
FACILITIES, EQUIPMENT AND SERVICES
  OFFICE/WORK SPACE
    ACOUSTIC SCREENS

DIGEST NOTES

The grievance in this case concerned the agency's implementation of space reduction and alterations at one of its offices. The dispute was submitted to arbitration where the parties could not agree on a stipulation of issues. In framing the issue, the arbitrator explained that the grievance to be resolved involved, among other things, compliance with the provisions of the agency's space management handbook, including provisions for acoustic screens. As his award, the arbitrator ordered that the agency provide free-standing acoustic screens consistent with the provisions of the agency's handbook.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its exceptions, the agency alleged that the arbitrator exceeded his authority by deciding an issue not submitted to arbitration and by exceeding his authority under the parties collective bargaining agreement. The agency alleged that nothing in the grievance suggested any dispute relating to the placement of partitions and that the issue of partitions was raised for the first time without warning at the arbitration hearing. The Authority held that the arbitrator did not exceed his authority by resolving the issue of partitions. The Authority, like Federal courts, will accord an arbitrator's interpretation of a submission agreement and an arbitrator's formulation of issues in the absence of a stipulation by the parties the same substantial deference accorded an arbitrator's interpretation and application of the collective bargaining agreement.

The agency also alleged in its exceptions that the arbitrator exceeded his authority by rendering an award that encompasses personnel outside the bargaining unit. The Authority agreed with the agency and made appropriate modifications to the remedy. An arbitrator exceeds his or her authority when the arbitrator issues an affirmative order affecting positions and personnel beyond the scope of the matter submitted to arbitration. The issues submitted to arbitration were expressly confined to the parties' collective bargaining agreement and necessarily were focused on bargaining unit employees. Consequently, the arbitrator's award must be confined to bargaining unit employees.

Federal Labor Relations Authority

24 FLRA No. 48

VA and AFGE, Local 2798
(Pritzker, Arbitrator), Case
No. 0-AR-1021 (Decided
December 15, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION	7121(f)
AUTHORITY OF ARBITRATOR	7122(a)
DISCRETION TO FASHION APPROPRIATE REMEDIES	
FORMULATION OF ISSUES IN THE ABSENCE OF A STIPULATION	
ARBITRABILITY	
TEMPORARY EMPLOYEES, TERMINATION	
ARBITRATION AWARDS, MODIFIED OR SET ASIDE BY AUTHORITY	
ARBITRATOR EXCEEDED HIS AUTHORITY	
DECIDING AN ISSUE NOT BEFORE HIM	
REMEDY FOR ISSUES NOT PROPERLY BEFORE THE ARBITRATOR	
ARBITRATION AWARDS, REMEDIES ORDERED BY ARBITRATORS	
POSITION	
INFORM GRIEVANT OF AND ALLOW HIM TO APPLY FOR VACANCIES	
ATTORNEY FEES	
ARBITRATION AWARDS	
REQUEST DENIED	
EQUAL ACCESS TO JUSTICE ACT	
CODE OF FEDERAL REGULATIONS	
5 C.F.R. 432.201(c)(3)(xii)	
5 C.F.R. 752.401(c)(6)	
UNITED STATES CODE	
5 U.S.C. 4303	
5 U.S.C. 7512	
EQUAL ACCESS TO JUSTICE ACT	

DIGEST NOTES

The grievance in this case concerned the termination of the grievant on the termination date of the appointment. The grievant was denied a second extension to the termination date of his appointment that was specified at the time of the appointment. The parties were unable to agree on an the issues. Accordingly, the arbitrator framed the issue as whether the agency's termination of the grievant was arbitrable and, if

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

arbitrable, was the termination in compliance with the collective bargaining agreement and applicable laws and regulations. The arbitrator determined that the grievance was arbitrable and the decision not to renew the grievant's appointment was not in violation of the parties' agreement and applicable laws and regulations. Nevertheless, as a remedy, the arbitrator ordered the agency to inform the grievant of vacancies and allow him to apply for those vacancies.

As one of its exceptions, the agency contended that the arbitrator exceeded his authority by ordering the agency to inform the grievant of vacancies. The Authority agreed with the agency and modified the award by striking the remedy. The Authority, like the Federal courts, will accord an arbitrator's interpretation of a submission agreement and an arbitrator's formulation of the issues submitted in the absence of a stipulation the same substantial deference accorded an arbitrator's interpretation and application of the collective bargaining agreement. Similarly, both the Authority and Federal courts have consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies. Nevertheless, both the Authority and Federal courts in private sector cases have indicated that in determining whether arbitrators have exceeded their authority, it is a fundamental principle that arbitrators must confine their decisions and possible remedies to those issues submitted to arbitration for resolution. When the arbitrator answered precisely that issue by concluding that the grievant's termination did not violate the agreement or any applicable law and regulation, the Arbitrator had decided the merits of the issue that he framed on the dispute submitted to him. By further ruling that the grievant be informed of and be allowed to apply for agency vacancies, the arbitrator exceeded his authority by deciding, and awarding a remedy concerning an issue not submitted to arbitration.

In its opposition to the agency's exceptions, the union argued that the award relates to a matter described in section 7121(f) and that therefore the exceptions should be dismissed for lack of jurisdiction under section 7122(a). Specifically, the union argued that the award relates to the removal of the grievant under 5 U.S.C. 4303 or 7512 which are matters described in section 7121(f). However, the Authority found that the award does not relate to matters described under section 7121(f). Regulations specifically exclude from the coverage of the actions set forth in section 4303 and 7512 the termination of an appointment on an expiration date if the date was specified as a condition of employment at the time the appointment was made. 5 C.F.R. 432.201(c)(3)(xii), 752.401(c)(6).

Federal
Labor Relations
Authority

24 FLRA No. 49

AFSCME, Local 3097 and Dep't of Justice, Case No. 0-NG-1100 (Decided December 15, 1986

SUBJECT MATTER INDEX ENTRIES

APPROPRIATE ARRANGEMENTS
  TRAINING
ASSIGN WORK, RESERVED MANAGEMENT RIGHT
  ADDITIONAL DUTIES
    PROHIBITION AGAINST THE ASSIGNMENT OF ADDITIONAL DUTIES
  TRAINING
CODE OF FEDERAL REGULATIONS
  5 C.F.R. 432.204(b)
CONTRACT OUT, RESERVED MANAGEMENT RIGHT
  COST-BENEFIT STUDIES
    REQUIREMENT TO CONDUCT A STUDY PRIOR TO CONTRACTING OUT
    REQUIREMENT TO FURNISH UNION WITH COPY OF STUDY
DISCIPLINE OF EMPLOYEES
  NOTICE PERIOD
  DELAY OF PERFORMANCE BASED DISCIPLINE
    120 DAY DELAY FOLLOWING A REORGANIZATION
FEDERAL PERSONNEL MANUAL
  CHAPTER 213, APPENDIX A, PARAGRAPH A-2(a)
INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE
  INTERNAL MANAGEMENT INFORMATION AND/OR DELIBERATIVE PROCESS
    COST-BENEFIT STUDIES
  TYPES OF INFORMATION SOUGHT
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MANAGEMENT RIGHTS: GENERALLY
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PROCEDURE
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TRAINING
  APPROPRIATE ARRANGEMENTS AND PROCEDURES
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    CONTINUATION OF THE SAME AMOUNT OF TRAINING

STATUTE

7105(a)(2)(E)
7106(a)(2)(A) and (B)
7106(b)(1) and (3)
7117(a)(1)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

UNITED STATES CODE
5 U.S.C. 4101(4)
5 U.S.C. 4109(a)(2)
5 U.S.C. 4303
5 U.S.C. 4303(b)
5 U.S.C. 4303(d)
5 U.S.C. 4303(c)
5 U.S.C. 7511
5 U.S.C. 7511(a)(1)(A)

DIGEST NOTES

Disputes regarding whether or not the union waived its right to bargain over the impact and implementation of a reorganization, when it negotiated the collective bargaining agreement, concerns a factual issue over the duty to bargain that should be raised in appropriate proceeding other than the filing of a negotiability petition.

A proposal is nonnegotiable that would delay performance based disciplinary action for 120 days following a reorganization so that the employee could demonstrate his post-reorganization performance that might be improved as a result of a more efficient and effective structure. Under 5 U.S.C. 4303(b), an employee is entitled to 30 days advance notice of a proposed performance-based adverse action. The notice period may be extended for no more than 30 days pursuant to internal agency regulation, and for an additional period only in accordance with regulations issued by OPM. [5 C.F.R. 432.204(b)]. This notice period is the period during which an employee may demonstrate improved performance so as to render the proposed adverse action unnecessary. [5 U.S.C. 4303(d)]. Subsection (c) provides that the decision regarding the adverse action shall be made within 30 days after the expiration of the notice period, that is, after the employee has had an opportunity to demonstrate improved performance. Therefore, an agency must complete a performance-based adverse action within 90 days of the date notice is given to the employee. (proposal 3)

A proposal is negotiable that would require the agency to provide employees with the same amount of training opportunities that it provided prior to a reorganization. Although the proposal requires the agency to exercise its right under 7106(a)(2)(B) to assign work by providing employees with a specific amount of training, the proposal does not excessively interfere with management's right and is an appropriate arrangement under section 7106(b)(3) for employees adversely affected by the reorganization. The proposal is important to employees because even the agency recognizes that, as a result of the reorganization, an employee's new duties may not be sufficiently related to certain course work to permit reimbursement and work assignments may be change to the extent that certain courses may no longer be relevant to the nature of the work performed. The proposal merely requires the agency to continue to provide the same amount of training opportunities that it provided prior to the reorganization but leaves to agency discretion decisions as to the type of training and whether or not training is to occur during duty hours. [majority opinion, part 1, proposal 1].

In an opinion concurring in part and dissenting in part to the above majority opinion, one Authority Member disagreed that the union identified any adverse effects flowing from the reorganization, and none were apparent from the record. In the absence of any showing that employees have been or will be adversely affected, the proposal cannot be considered an "arrangement" designed to mitigate adverse affects. As a result, it cannot be determined whether the proposed arrangement "excessively interferes" with the exercise of management rights. [dissenting opinion, part 1, proposal 1]

A proposal is nonnegotiable which provides that "previous training" will not ". . . be invalidated as a result of the reorganization." In the majority's view, this proposal would prohibit the assignment of additional duties to a position if additional training were required to perform those duties. The proposal interferes with management's right to assign work under section 7106(a)(2)(B). (majority opinion, part 2, proposal 1)

In a dissenting opinion, one Authority Member disagreed that part 2 of proposal 1 would prevent the agency from changing the job requirements of a position after reorganization. The Member found the proposal to be negotiable since, in the Member's view, the proposal does not interfere with management's right under section 7106(a)(2)(B) to assign work. (dissenting opinion, part 2, proposal 1)

A proposal is nonnegotiable that would require the agency to conduct a cost-benefit analysis as part of its process of determining whether to contract out certain functions, and furnish a copy to the union prior to making a contracting out determination. The proposal would place a substantive restriction on the agency's exercise of its right under section 7106(a)(2)(B) to contract out and interferes with the agency's deliberative process. (majority opinion, proposal 2)

In a dissenting opinion, one Authority Member disagreed that conducting a cost-benefit study and furnishing a copy to the union would interfere with management's deliberative process. Providing the union with a copy of a comparison of the estimate of the cost of Government performance of an activity to the cost of performance by a prospective contractor is not the same as providing the union with an internal management recommendation. Also, the proposal does not require the agency to furnish a copy

prior to making any contracting out determination, but instead, only requires the agency to furnish a copy "prior to signing a contract". Finally, the Authority has previously held that a union may be entitled to any cost-benefit analysis under section 7114(b)(4)(B) for impact bargaining purposes, if the information is "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of bargaining. (dissenting opinion, proposal 2)

Federal Labor Relations Authority

24 FLRA No. 50

AFGE, Local 1501 and HHS, SSA, Baltimore, Md., Case No. 0-NG-830 (Decided December 15, 1986

SUBJECT MATTER INDEX ENTRIES	STATUTE
APPROPRIATE ARRANGEMENTS	7105(a)(2)(E)
FOUND TO BE AN "ARRANGEMENT"	7106(a)(2)(B)
EXCESSIVE INTERFERENCE TEST	7106(b)(3)

APPROPRIATE ARRANGEMENTS
  FOUND TO BE AN "ARRANGEMENT"
  EXCESSIVE INTERFERENCE TEST
    TOTAL ELIMINATION OF MANAGEMENT'S DISCRETION
ASSIGN WORK, RESERVED MANAGEMENT RIGHT
  ELEMENTS OF THE RIGHT TO ASSIGN WORK
    PARTICULAR EMPLOYEES TO WHOM WORK WILL BE ASSIGNED
MANAGEMENT RIGHTS: GENERALLY
  EXERCISE OF MANAGEMENT JUDGMENT
    TOTAL ELIMINATION OF MANAGEMENT'S DISCRETION
    UNION'S JUDGMENT SUBSTITUTED FOR MANAGEMENT'S JUDGMENT
  PRIORITIZING OF MANAGEMENT OBJECTIVES
    "UNNECESSARY"
    "UNREASONABLE"
NEGOTIABILITY PROCEDURE
  ALLEGATION OF NONNEGOTIABILITY
    UNSOLICITED ALLEGATION OF NONNEGOTIABILITY
      MAY BE IGNORED BY UNION
  DEFICIENCIES, TIMELY CORRECTION OF
    FACTORS IN DETERMINING THAT DEFICIENCIES HAVE BEEN REMEDIED
      NO PREJUDICE SUFFERED
      NO REAL DISADVANTAGE SUFFERED
  DEFICIENCY LETTER
    TIMELY CORRECTION OF DEFICIENCIES
      SERVICE
  MOOTNESS
    ISSUE RESOLVED IN A RELATED ULP PROCEEDING

DIGEST NOTES

Contrary to the agency, the Authority held that the union's proposals were properly filed. There was no question that the union's initial filing was flawed for failing to serve a copy of the petition for review and related documents on the proper agency representatives. However, when the Authority advised the

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES

union of the deficiencies in its petition, it remedied the deficiencies in the time set by the Authority. The agency suffered no real disadvantage by not receiving the initial petition because all the information relevant to the appeal was contained in the supplemental filing the was properly served on all parties. Also, there was no prejudice to the agency caused by the flawed initial filing. The negotiability issues which are subject of this appeal were also involved in a parallel ULP proceeding.

Two proposals were moot and not considered in this negotiability proceeding since those proposals were decided in a parallel ULP proceeding.

A proposal is nonnegotiable that prescribes specific criteria -- "unreasonable or unnecessary workload burden" which the agency must observe in deciding which work will be assigned to employees. The Authority concluded that the union intended its proposal to dictate to the agency specific employees to be assigned to process various types of cases. The proposal would directly interfere with management's right to assign work under section 7106(a)(2)(B). The proposal, though an arrangement for adversely affected employees by management's exercise of its rights, is not appropriate under section 7106(b)(3). The proposal excessively interferes with management's right by seeking to substitute the union's judgment as to the appropriateness of assignments for that of management. It would dictate that assignments be made without regard to valid, work-related considerations and totally eliminate the agency's discretion to make necessary judgments relating to work assignments.

Federal Labor Relations Authority

24 FLRA No. 51

AFGE, Local 997 and Dep't of the Air Force, Maxwell Air Force Base, Ala., Case No. 0-NG-777 (Decided December 15, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
BUDGET, MANAGEMENT RIGHTS	7105(a)(2)(D) and (E)
FRINGE BENEFITS	7106(a)(1)

COMPELLING NEED
  PROPOSALS ALLEGED BARRED BY AN AGENCY REGULATION
    FRINGE BENEFITS
FRINGE BENEFITS
  ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE
    PAYMENT OF PREMIUMS THAT ARE NOT ESTABLISHED BY LAW
  LIFE INSURANCE
    PAYMENT OF PREMIUMS THAT ARE NOT ESTABLISHED BY LAW
  MEDICAL INSURANCE
    PAYMENT OF PREMIUMS THAT ARE NOT ESTABLISHED BY LAW

DIGEST NOTES

A proposal is negotiable which provides that the agency will pay up to 75 percent of the premium cost of health, life and accidental death and dismemberment insurance for employees whose benefits are not established by law. The proposal does not interfere with management's right to determine its budget under section 7106(a)(1). Nor does the proposal conflict with an agency regulation for which there is a compelling need. (majority opinion)

In the view of one Authority Member, the above proposal is not negotiable. (dissenting opinion)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

24 FLRA No. 52

NTEU and Dep't of Energy, Case No. 0-NG-983 (Decided December 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- APPROPRIATE ARRANGEMENTS
  - FILLING POSITIONS DURING A RIF
- CODE OF FEDERAL REGULATIONS
  - 5 C.F.R. 351
  - 5 C.F.R. 351.201(b)
- APPOINTMENTS, SELECTION FOR
  - LIMITATIONS ON SELECTION
    - DELAY IN FILLING POSITION
    - LIMITED TO BARGAINING UNIT EMPLOYEES ONLY
  - REDUCTION-IN-FORCE
- FEDERAL PERSONNEL MANUAL
  - CHAPTER 335, SUBCHAPTER 1-4, REQUIREMENT 4
  - CHAPTER 351, SUBCHAPTER 1-5(a)(5)
  - CHAPTER 351, SUBCHAPTER 1-5(b)(2)
- HIRE, RESERVED MANAGEMENT RIGHT [7106(a)(2)(A)]
  - POSITIONS
  - REDUCTION-IN-FORCE
  - TEMPORARY EMPLOYEE RESTRICTION
- POSITION, FILLING OF
  - HIRING FREEZE
- PROCEDURES, MANDATORY SUBJECTS OF BARGAINING [7106(b)(2)]
  - DELAY
    - PROPOSALS THAT DELAY MANAGEMENT EXERCISE OF ITS RIGHTS
- REDUCTION-IN-FORCE
  - BUMPING/RETREAT RIGHTS
  - FILLING POSITIONS DURING OR FOLLOWING A RIF
    - TEMPORARY HIRING FREEZE FROM SOURCES OUTSIDE THE AGENCY OR UNIT

STATUTE

- 7105(a)(2)(E)
- 7106(a)(2)(A)
- 7106(a)(2)(C)(ii)
- 7106(b)(1), (2) and (3)

DIGEST NOTES

A proposal is negotiable that would suspend the filling of any vacant bargaining unit position for which employees affected by a RIF would be eligible from the date a RIF notice is received by the affected employees until the effective date of the RIF

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

action. The proposal is intended to allow affected employees both to exercise their bumping and retreat rights and to take advantage of possible reassignment to such vacant positions. If the agency decides to fill a vacancy covered by the proposal during a RIF, the proposal only requires the agency to either fill that vacancy with an eligible bargaining unit employee affected by the RIF or delay filling the vacancy until the RIF is over. Hence, the proposal merely delays management's exercise of its rights to select an employee from any appropriate source under section 7106(a)(2)(C)(ii) and, correlatively, to hire from outside the bargaining unit under section 7106(a)(2)(A). This delay would only occur in very limited circumstances when (1) there is a qualified individual in the bargaining unit, (2) that employee would be affected by the RIF, and (3) management decides not to select that employee. Such a proposal is a procedure which is negotiable under 7106(b)(2) because it delays but does not prevent management from acting at all to exercise its rights. Furthermore, the proposal is not inconsistent with Requirement 4 of subchapter 1-4, chapter 335 of the FPM governing competitive procedures for filling positions since section 351.201(b) of the OPM RIF regulations gives an agency discretion to fill vacant positions during a RIF with affected employees. (majority opinion)

One Member concurred with the result of the majority opinion but for different reasons. In his view, the proposal would interfere with management's right under section 7106(a)(2)(A) to hire from outside the bargaining unit and does not constitute a procedure under section 7106(b)(2). However, the proposal is an appropriate arrangement under section 7106(b)(3) because the interference with the agency's ability to carry out its mission would not be substantial. (concurring opinion)

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24 FLRA No. 44

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

Agency

and

Case No. 0-AR-1259

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 476

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Jerome H. Ross filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated September 24, 1986, and, in the absence of evidence to the contrary, appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on October 28, 1986.

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

However, the exceptions were not filed with the Authority at its national office in Washington, D.C., until October 30, 1986. The Union sent the exceptions by regular mail from Takoma Park, Maryland on October 23, 1986. In this regard, the record establishes that while the Union identified the Authority as the addressee on the envelope containing the exceptions, the remainder of the address used on the envelope was that of the national office of the National Labor Relations Board. The Office of the Executive Secretary of the National Labor Relations Board received the exceptions on October 28, 1986, and then forwarded them to the national office of the Authority. The exceptions were not received by the Authority's national office until October 30, 1986,[3] and, therefore, were untimely filed.

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., December 11, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

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[3] Since the Authority's inception in 1979, its Rules and Regulations have required that exceptions to an Arbitrator's award must be filed with the Authority at its national office in Washington, D.C.

24 FLRA No. 45

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES

Union

and   Case No. 0-NG-1109

GENERAL SERVICES ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority on a petition for review of negotiability issues filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and part 2424 of the Authority's Rules and Regulations. It raises issues concerning the negotiability of two Union proposals.[1] We find both proposals to be negotiable.

II. Proposal 1

> Each office to be occupied by one of the Union's National Council officers will be provided with normal office furniture and a telephone.

[Only the underlined portions are in dispute.]

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[1] The Union's motion for a hearing pursuant to 5 CFR § 2424.9 is denied because there is sufficient evidence in the record upon which to base a reasoned decision.

Proposal 2

> Council officers and local Union officials may use FTS for necessary communications in handling issues that arise between the Union and Management. The use of facility telephone services is also available for communications.

III. Positions of the Parties

The Agency states that its objection is not based on use of the telephones by the Union for internal union business within the proscription of section 7131(b) of the Statute. According to the Agency, the parties are in agreement that the telephones are not to be used for internal union business. Rather, the Agency's position is that the proposals are nonnegotiable because both the installation by the Agency of telephones in union offices and the use by the Union of those telephones and existing government telephones for local or long-distance telephone calls are contrary to law and government-wide regulation. Specifically, the Agency argues that such proposals are contrary to 31 U.S.C. § 1348(b) and 41 CFR § 201-38.007 which both restrict use of a government telephone to "official business" or "official Government business." The Agency maintains that a labor organization and labor-management relations activities are no different than any other private organization and its activities. The Agency further argues that because of this restriction of installation and use of the government telephone, the proposals also are contrary to 31 U.S.C. § 1301, which provides that appropriations shall be applied only for appropriate purposes. The Union disputes these Agency contentions.

IV. Analysis and Conclusions

The Agency's position on both proposals is essentially the same: use of a government telephone for the purpose of conducting labor-management relations activities is not for the purpose of official Government business and hence is contrary to law and government-wide regulation. In *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 FLRA No. 2 (1986), *petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA*, No. 86-1198 (D.C. Cir. Mar. 27, 1986), we found that a proposal providing for agency payment of travel expenses attendant to labor-management relations activities was within the duty to bargain under the Statute. We rejected the agency's contention that the proposal was inconsistent with the Travel Expense Act which, in sum, provides that Federal employees traveling on official business are entitled to appropriate expenses and allowances. 5 U.S.C. § 5701 et seq. We noted that neither the Act nor travel regulations specifically define the term "official business," but that the term had been construed to require a determination that the activity was sufficiently within the interest of the United States. Concluding that such determinations are within the discretionary administrative authority of an agency, we consequently held that the agency was obligated under the Statute to exercise that discretion through negotiation unless precluded by regulatory or statutory provisions.

Applying these principles in this case, we find that both proposals are negotiable. Initially, we must reject the Agency's assertion that a labor organization operating as an exclusive representative of employees in an appropriate unit and performing labor-management relations activities under the Statute is no different than any other private organization and its activities. As expressly set forth in section 7101 of the Statute and as specifically acknowledged by the Authority, labor organizations and collective bargaining are in the public interest. See Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9, 11 (1981). More specifically, Congress found that statutory protection of the right of employees to bargain collectively through labor organizations safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages amicable settlement of disputes. Thus, the Agency's reliance on decisions prohibiting provision of telephone service to private organizations is misplaced.

The issue is whether the proposals are outside the duty of the Agency to bargain under the Statute. As in U.S. Customs Service, the statutory and regulatory provisions cited by the Agency do not specifically define the terms "official business" or "official Government business" for which purpose the use of any government telephone is restricted. The terms have been construed as requiring a determination that the purpose of the use of the government telephone is in the interest of the United States. Matter of: Gerald S. Mathews, Comptroller General Decision No. B-220104, Aug. 4, 1986. Consequently, as in U.S. Customs Service, we find in this case that the proposals are not inconsistent with law or government-wide regulation, as alleged, specifically 31 U.S.C. §§ 1301, 1348(b) and 41 CFR § 201-38.007.[2] The Agency fails to cite any statutory or regulatory provision which would prohibit it from exercising through negotiations its discretion to determine that telephone installation and service for union offices relating to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business. Likewise, the proposals do not require telephone installation or service which does not comport with cited statutory and regulatory requirements and restrictions.

In addition, we note that finding these proposals to be negotiable is consistent with other Authority decisions addressing proposals or provisions for telephone use by union officials in conducting labor-management relations activities under the Statute. American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980) (Proposal II), enforced as to other matters sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982); American Federation of Government Employees, AFL-CIO, Local 3748 and Department of Agriculture, Science and Education Administration, Personnel Division, Hyattsville, Maryland, 11 FLRA 122 (1983); Department of the Air Force, Flight Test Center, Edwards Air Force Base, California and Interdepartmental Local 3854, American Federation of Government Employees, AFL-CIO, 21 FLRA No. 61 (1986). See also National Treasury Employees Union and Internal Revenue Service, Denver District, 24 FLRA No. 30 (1986). Of course, telephone use by union officials in conducting labor-management relations activities under the Statute must be distinguished from telephone use by employees in performance of the official duties of their positions which use implicates management rights under section 7106(b)(1) of the Statute. American Federation of Government Employees, AFL-CIO, Local 3760 and Social Security Administration, Disability Analysis Branch, Field Assessment Office, 11 FLRA 576 (1983); American Federation

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[2] Because 41 CFR § 201-38.007 is generally applicable throughout the Federal Government, we find that it is a government-wide regulation within the meaning of section 7117 of the Statute. See National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 747 (1980).

of Government Employees, Local 644, AFL-CIO and U.S. Department of Labor, Mine Health and Safety Administration, Morgantown, West Virginia, 15 FLRA 902 (1984) (proposal 3). Accordingly, proposals 1 and 2 are within the duty to bargain under the Statute.

V. Order

The Agency must upon request (or as otherwise agreed to by the parties) bargain concerning proposals 1 and 2.[3]

Issued, Washington, D.C., December 12, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In deciding that proposals 1 and 2 are within the Agency's duty to bargain, we make no judgment as to their merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY

U.S. DEPARTMENT OF LABOR

Agency

and

Case No. 0-AR-1119

LOCAL 12, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Edith Barnett filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the failure of the four grievants to be promoted. The grievants are GS-9 disclosure reports specialists in a career-ladder with a full performance level of GS-11. After the grievants had met the time-in-grade requirements for promotion and, in the judgment of their supervisor, had demonstrated the ability to perform at the GS-11 level, but had not been promoted, they met with their supervisor who told them that the "climate was not right" for their promotions. Subsequently, the grievants had a meeting with the division chief who, according to the Arbitrator, also told them that under "the present administration" the "climate was not right" for their promotions. Not satisfied, the grievants filed the grievance challenging their failure to be promoted. At arbitration the Arbitrator framed the issues as whether the grievance was arbitrable and whether the Agency violated the collective bargaining agreement by failing to promote the grievants.

On the issue of arbitrability, the Arbitrator ruled that the grievance was arbitrable. Contrary to the contention of the Agency, she determined that the grievance only concerned whether the Agency properly refused to promote the grievants and did not concern the classification of any position.

On the merits issue, the Arbitrator ruled that the Agency's failure and refusal to promote the grievants on their eligibility date was arbitrary and capricious and in violation of Article 21, Sections 3c and 3d of the collective bargaining agreement. The Arbitrator further ruled that but for the arbitrary and capricious actions of the grievants' supervisors, which were in violation of the collective bargaining agreement, the grievants would have been promoted to GS-11 on July 24, 1983. Accordingly, the Arbitrator ordered the grievants promoted to GS-11 retroactive to July 24, 1983, with backpay.

In her opinion accompanying the award, the Arbitrator discussed her reasoning in concluding that the failure and refusal to promote the grievants was arbitrary and capricious. Primarily, the Arbitrator rejected the Agency's position that the grievants were not promoted because sufficient work at the GS-11 level was not available. Instead, she found that in not promoting the grievants, their supervisors were motivated by "subjective and unsupported fears about the general 'climate' for promotions." In addition, she separately and independently found that even if the grievants' supervisors were motivated by a good-faith belief that sufficient work was not available, their failure to promote the grievants was still arbitrary. She concluded that the proper procedure in such circumstances is not to deny individual promotions but to challenge the career ladder itself.

III. FIRST EXCEPTION

A. Contentions

The Agency contends that the award is deficient by finding the grievance to be arbitrable. The Agency maintains that the grievance concerns the classification of a position within the meaning of the exclusion of section 7121(c)(5) of the Statute and a corresponding exclusion of the collective bargaining agreement.

B. Analysis and conclusions

The Agency fails to establish that the award is contrary to section 7121(c)(5) and the collective bargaining agreement. We have specifically held that a grievance and an award which pertain to whether a grievant is entitled to a career-ladder promotion do not concern the classification of any position within the meaning of section 7121(c)(5). American Federation of Government Employees, Local 3258 and U.S. Department of Housing and Urban Development, 21 FLRA No. 56 (1986). In this case, we similarly find contrary to the contention of the Agency that the grievance and award pertain to whether the Agency properly refused to promote the grievants and do not directly concern the classification of any positions.

IV. SECOND EXCEPTION

A. Contentions

The Agency contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596. Specifically, the Agency argues that the Arbitrator failed to make all the findings necessary to an award of backpay and that some of her findings are not supportable.

B. Analysis and conclusions

The Agency fails to establish that the award of a retroactive promotion and backpay is contrary to the Back Pay Act. With respect to awards of backpay, the Authority has specifically stated that in order for an award of backpay to be authorized under the Back Pay Act, the arbitrator must find that an agency personnel action with respect to the grievant was unjustified or unwarranted; that such unjustified or unwarranted personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials; and that but for such action, the grievant otherwise would not have suffered such withdrawal or reduction of pay, allowances, or differentials. For example, U.S. Army Aberdeen Proving Ground and Local 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, 19 FLRA No. 35 (1985). We find contrary to the contention of the Agency that the Arbitrator made all the findings necessary to her award of a retroactive promotion and backpay. She specifically found that by failing to promote the grievants on their eligibility date, the Agency violated Article 21 of the collective bargaining agreement and that but for this violation, the grievants would have been promoted to GS-11 on July 24, 1983. Furthermore, the Agency's contention that these findings are not supportable constitutes nothing more than disagreement with the Arbitrator's interpretation and application of the collective bargaining agreement and with her findings of fact and her reasoning and conclusions. Such disagreement provides no basis for finding the award deficient. For example, U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 22 FLRA No. 16 (1986). Consequently, no basis is provided for finding the award contrary to the Back Pay Act.

V. THIRD EXCEPTION

A. Contentions

The Agency contends that the award is either contrary to the Classification Act, 5 U.S.C. § 5101 et seq., and classification regulations, FPM chapter 511, or is contrary to section 7106(a) of the Statute. The Agency explains that the Classification Act and the FPM require as part of any promotion recommendation a certification from the supervisor that the position description of the position to which the recommended employee is to be promoted accurately reflects the duties that will be assigned the employee. In this case, the Agency maintains that the required certification cannot be made because there is no work at the GS-11 level to be performed. The Agency asserts that the certification can only be made if management creates enough GS-11 work for the grievants to perform. Thus, the Agency argues that by ordering the grievants promoted, the award must violate the Classification Act and FPM chapter 511 or management's rights under section 7106(a). The Agency asserts that as ordered, the award violates the Act and the FPM because it would require the grievant's supervisor to falsify the certification that the position description of the GS-11 position accurately reflects the duties to be performed by the grievants. The Agency asserts alternatively that to create GS-11 duties to implement the award consistent with the Act and the FPM would violate numerous management rights under section 7106(a). Accordingly, the Agency concludes that the award must be found deficient as contrary to law.

B. Analysis and conclusions

The Agency fails to establish that the award is contrary to law or regulation. The Agency's exception that the award must be found contrary to classification law and regulation or section 7106(a) is necessarily founded on the premise that there was a lack of work at the GS-11 level.

The Arbitrator specifically addressed in her award the issue of a lack of work at the GS-11 level, but she made separate and alternative findings. On the one hand, she found that even if the grievants' supervisors had a good-faith belief as to the lack of work, their failure to promote the grievant was still arbitrary. We conclude that any reliance on this finding as permitting the Agency to argue before the Authority that there was in fact a lack of work at the GS-11 level is misplaced. This finding by the Arbitrator constituted a separate and independent basis for her conclusion that the failure to promote the grievants was arbitrary which assumed a good-faith belief by the grievants' supervisors of a lack of work. But on the other hand and primarily, the Arbitrator separately found that there was not any lack of work at the GS-11 level and that the supervisors were instead motivated by subjective and unsupported fears about the climate for promotions. Thus, we find that this exception, which is based on the premise that there was a lack of work at the GS-11 level, constitutes disagreement with the Arbitrator's findings of fact and her reasoning and conclusions which, as we recognized earlier, provides no basis for finding the award deficient.

VI. FOURTH EXCEPTION

A. Contentions

The Agency contends that the award does not draw its essence from the collective bargaining agreement. Specifically, the Agency argues that the award is deficient because the Arbitrator erroneously interpreted the parties' collective bargaining agreement to find that a career-ladder promotion is a ministerial act under the agreement and that the availability of work at the next higher-grade level is not a requirement under the agreement for a career-ladder promotion.

B. Analysis and conclusions

The Agency fails to establish that the award does not draw its essence from the collective bargaining agreement. The exception clearly constitutes nothing more than disagreement with the Arbitrator's interpretation and application of the parties' collective bargaining agreement and her reasoning and conclusions in reaching her award. As we have repeatedly held, such disagreement provides no basis for finding an award deficient.

VII. FIFTH EXCEPTION

A. Contentions

The Agency contends that the award is based on a nonfact. Specifically, the Agency argues that the Arbitrator's findings are premised on a false assumption. The Agency maintains that the Arbitrator's finding that the grievants' supervisors promoted other GS-9 employees in the career ladder both shortly before and after the grievants became eligible for promotion is erroneous and that therefore the award is deficient.

B. Analysis and conclusions

The Agency fails to establish that the award is deficient under the Statute. We will find an award deficient under the Statute when it is demonstrated that the central fact underlying the award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. For example, U.S Army Missile Command, Redstone Arsenal, Alabama and Local 1858, American Federation of Government Employees, AFL-CIO, 18 FLRA No. 50 (1985). In order for an award to be found deficient on this ground, it must be established that the alleged "nonfact" involved a fact that was objectively ascertainable, was the central fact underlying the award, and was concededly erroneous and that but for the arbitrator's misapprehension, the arbitrator would have reached a different result. For example, International Brotherhood of Electrical Workers and United States Army Support Command, Hawaii, 14 FLRA 680 (1984). Without fully addressing the statements of the Arbitrator cited by the Agency in terms of this ground, it is apparent that the Arbitrator based her conclusion that the grievants' supervisors acted arbitrarily on findings more extensive than the finding cited by the Agency. Primarily, she found that the supervisors were motivated by fears about the general climate for promotions and that such fears were subjective and unsupported. Thus, it is not established, even if the cited statement of the Arbitrator were concededly erroneous, that this "is the fact on which the award is based" and that "but for the arbitrator's misapprehension, the arbitrator would have reached a different result." See Army Support Command, Hawaii, 14 FLRA at 681 (quoting with original emphasis United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, 2 FLRA 432, 438 (1980)). Accordingly, no basis is provided for finding the award deficient.

VIII. DECISION

For these reasons the Agency's exceptions are denied.

Issued, Washington, D.C., December 15, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

24 FLRA No. 47

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, .D.C

U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

Agency

and

Case No. O-AR-1124

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL No. 3412

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Alfred J. Goodman filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the Agency's implementation of space reductions and alterations in its Jacksonville office. As the office alterations began, the parties met to negotiate appropriate arrangements for bargaining unit employees adversely affected by the alterations. When management declared most of the Union's proposals were not negotiable and proceeded with the alterations, the Union filed a grievance claiming management violated Article 36 and Article 3, Section 3.01 and 3.08 of the parties' collective bargaining agreement. The dispute was submitted to arbitration where the parties could not agree on a stipulation of the issues. The Arbitrator framed the issues before him as follows:

> Did Management violate the HUD-AFGE Agreement by failing to bargain in good faith and by violating Article 36; Article 3, Sections 3.01 and 3.08; Article 5, Section 5.02; the Space Management Handbook; and other regulations?

In framing the issues to be resolved, the Arbitrator explained that in its grievance the Union specifically alleged a violation of Article 36 of the agreement and that Article 36 made pertinent the Agency's space management handbook, including provisions for acoustic screens. After considering the evidence and testimony, including testimony by management's director of administrative services on the use of acoustic screens under the space management handbook and testimony confirming management's offer during negotiations to use additional partitions, the Arbitrator ruled that management violated Article 36 of the agreement because acoustic screens had not been provided in accordance with the space management handbook. Accordingly, as his award, the Arbitrator ordered as follows:

> Management will survey all floors occupied by HUD in Jacksonville, Florida, and provide free-standing acoustic screens in the ratio of at least one linear foot for each 30 occupiable square feet in accordance with Section 4-2d, consistent with the provisions of Section 4-3c of the Space Management Handbook No. 2216.1 dated November 30, 1983.

III. EXCEPTION

The Agency contends that the award is deficient because the Arbitrator exceeded his authority in a number of ways. The Agency contends that the Arbitrator exceeded his authority by deciding the issue of placement of partitions because that issue was not submitted to arbitration. More specifically, the Agency argues that nothing in the grievance suggested any dispute relating to the placement of partitions and that the Arbitrator's use of the claimed violation of Article 36 to authorize him to address the Agency's space management handbook was tenuous. The Agency further argues that the Arbitrator exceeded the limits of his authority under the parties' collective bargaining agreement and that management was harmed by the issue of partitions being raised for the first time without warning at the arbitration hearing. The Agency also contends that the Arbitrator exceeded his authority by rendering an award that encompasses personnel outside the bargaining unit. The Agency maintains that the Arbitrator's award is not limited to space occupied by bargaining unit employees and claims that it would be impossible to limit the implementation of the award to the bargaining unit because of office configuration placing bargaining unit employees and nonbargaining unit personnel together.

In its opposition the Union disagrees with the Agency. The Union argues that the Article 36 claim properly authorized the Arbitrator to address and resolve whether management complied with its own regulations including the space management handbook. The Union specifically disputes that the issue of partitions was raised for the first time and without warning at the hearing. The Union asserts that the issue of partitions was extensively covered in its proposals that management declared nonnegotiable. The Union also specifically disputes that the award improperly encompasses personnel outside the bargaining unit. Contrary to the contention of the Agency, the Union asserts that the award only affects bargaining unit employees because all nonbargaining unit personnel already have partitions or offices.

IV. ANALYSIS AND CONCLUSIONS

We conclude that the Arbitrator did not exceed his authority by resolving the issue of partitions, but that he did exceed his authority to the extent that his award is not limited to bargaining unit employees.

The Authority has held that an arbitrator exceeds his or her authority if the arbitrator resolves an issue not submitted to arbitration. For example, National Center for Toxicological Research, Jefferson, Arkansas and American Federation of Government Employees, Local 3393, NCTR, Jefferson, Arkansas, 20 FLRA No. 81 (1985). But the Authority, like the Federal courts, will accord an arbitrator's interpretation of a submission agreement and an arbitrator's formulation of issues in the absence of a stipulation by the parties the same substantial deference accorded an arbitrator's interpretation and application of the collective bargaining agreement. For example, Mobil Oil Corp. v. Independent Oil Workers Union, 679 F.2d 299 (3d Cir. 1982). Similarly, both the Authority and Federal courts have consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies. For example, U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Lexington, Kentucky and American Federation of Government Employees, Local 817, 21 FLRA No. 108 (1986); IAM District 776 v. Texas Steel Co., 639 F.2d 279 (5th Cir. 1981).

In this case no basis is provided for finding that the Arbitrator exceeded his authority by resolving the issue concerning partitions. This contention constitutes nothing more than disagreement with the Arbitrator's formulation of the issue in the case in the absence of a stipulation by the parties and with the Arbitrator's fashioning of a remedy for management's violation of the agreement. In its grievance the Union specifically alleged a violation of Article 36 which the Arbitrator found to encompass the space management handbook, including the provisions pertaining to placement of acoustic screens. The Agency's assertion that this formulation by the Arbitrator is "tenuous" merely disagrees with the Arbitrator's formulation and, in view of the substantial deference accorded arbitrators, provides no basis for finding the award deficient. The Agency also fails to establish that this issue was raised for the first time at the hearing or that the Agency was prejudiced. The director of administrative services testified to management's offer during negotiations to use additional partitions and the Agency fails to substantiate that no proposals were offered by the Union relating to partitions. Furthermore, we are unable to conclude that the Agency is prejudiced by the Arbitrator's remedy effectively ordering the Agency to comply with the acoustic screen provisions of its own space management handbook to the extent that the provisions apply.

The Authority has also held that an arbitrator exceeds his or her authority when the arbitrator issues an affirmative order affecting positions and personnel beyond the scope of the matter submitted to arbitration. For example, Environmental Protection Agency, Region 9 and Engineers and Scientists of California, MEBA, AFL-CIO, 17 FLRA 365 (1985). In this case we find that the Arbitrator exceeded his authority by failing to confine his remedy to bargaining unit employees. The issues submitted to arbitration were expressly confined to the parties' collective bargaining agreement and necessarily were focused on bargaining unit employees. Consequently, the Arbitrator's award must be confined to bargaining unit employees. We will modify the award accordingly. In modifying the award, we find that the Agency has failed to establish that an award requiring the provision of acoustic screens to bargaining unit employees consistent with office configuration is impossible to implement.

V. DECISION

Accordingly, the award is modified to provide as follows:

> Management will survey all floors occupied by HUD bargaining unit employees in Jacksonville, Florida, and provide consistent with office configuration free-standing acoustic screens to those employees in the ratio of at least one linear foot for each 30 occupiable square feet in accordance with Section 4-2d, consistent with the provisions of Section 4-3c, of the Space Management Handbook No. 2216.1, dated November 30, 1983.

Issued, Washington, D.C. December 15, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY

VETERANS ADMINISTRATION

Agency

and

Case No. 0-AR-1021

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, Local 2798

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Malcolm L. Pritzker filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.[1]

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[1] In its opposition the Union argues that the award relates to a matter described in section 7121(f) of the Statute and that therefore the exceptions should be dismissed for lack of jurisdiction under section 7122(a). Specifically, the Union argues that the award relates to the removal of the grievant under 5 U.S.C. § 4303 or § 7512 which are matters described in section 7121(f). As is clearly stated by the Arbitrator, this matter concerns the termination of the grievant's appointment on the expiration date specified in the 1983 extension of his appointment. Regulations specifically exclude from the coverage of the actions set forth in section 4303 and 7512 the termination of an appointment on an expiration date if the date was specified as a condition of employment at the time the appointment was made. 5 CFR §§ 432.201(c)(3)(xii), 752.401(c)(6). Consequently, we find that the award does not relate to a matter described in section 7121(f) and that no basis is provided for dismissing the exceptions under section 7122(a).

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the termination of the grievant's appointment on November 30, 1984. The grievant was selected as an outreach specialist on an appointment that was not to exceed September 30, 1982. Subsequently, his appointment was extended with the last extension not to exceed November 30, 1984. After he was terminated, the grievant filed a grievance challenging the decision not to further extend his appointment. The grievance was submitted to arbitration where the parties were unable to agree on the issues. Accordingly, Arbitrator framed the issues submitted as follows:

> 1. Is the agency's termination [of the grievant] arbitrable?
>
> 2. If arbitrable, was the termination [of the grievant] in compliance with the collective bargaining agreement and applicable laws and regulations? If not, what is the appropriate remedy?

In resolution of these issues, the Arbitrator concluded as follows:

> 1. The decision not to renew [the grievant's] appointment is grievable and arbitrable.
>
> 2. The decision not to renew [the grievant's] appointment is not in violation of the collective bargaining agreement and applicable laws and regulations.

After reaching these conclusions, the Arbitrator expressed concern over the conflict between testimony of an agency regional manager and a suggestion of an agency auditor. The Arbitrator stated that he understood the manager's testimony to be that he would not consider the grievant for any excepted service positions at GS-9 and below while the auditor had recommended that the grievant be reassigned rather than terminated. In order to apply the auditor's recommendation and avoid an inference of disparate treatment, the Arbitrator consequently ruled in addition that the grievant be informed of agency vacancies and be allowed to apply for those vacancies. Accordingly, the Arbitrator awarded as follows:

> 1. The decision not to renew [the grievant's] appointment is grievable and arbitrable.
>
> 2. The decision not to renew [the grievant's] appointment is not in violation of the collective bargaining agreement and applicable law and regulations.
>
> 3. For a period of twelve months from the date the decision is received the agency should communicate all openings in the VA at the GS-9 level or below to [the grievant] either by mail or by making the announcement of the openings available at an office location to be selected by the agency which location should be communicated to [the grievant]. [The grievant] may apply for openings for which he believes he is qualified. The agency will apply its usual selection criteria to applications made by [the grievant].

III. EXCEPTIONS

As one of its exceptions, the Agency contends that the Arbitrator exceeded his authority in paragraph 3 of the award. Specifically, the Agency maintains that as framed by the Arbitrator, the issue submitted to arbitration on the merits was whether the grievant's termination violated the collective bargaining agreement or applicable law and regulation and, if so, what remedy was appropriate. Thus, the Agency argues that once the Arbitrator resolved this issue by finding no violation, he had no authority to fashion a remedy and no authority to apply a recommendation of an agency auditor.

In opposition the Union contends that the Arbitrator did not exceed his authority. The Union argues that paragraph 3 constitutes an appropriate mitigation by the

Arbitrator of the penalty of the termination of the grievant's employment.

IV. ANALYSIS AND CONCLUSIONS

We agree with the Agency that the Arbitrator exceeded his authority in paragraph 3 of the award. The Authority has specifically held that an arbitrator's award will be found deficient as in excess of the arbitrator's authority when the arbitrator resolves an issue not submitted to arbitration. National Center for Toxicological Research, Jefferson, Arkansas and American Federation of Government Employees, Local 3393, NCTR, Jefferson, Arkansas, 20 FLRA No. 81 (1985); Federal Aviation Science and Technological Association, Local No. 291, Fort Worth, Texas and Federal Aviation Administration, Fort Worth Air Route Traffic Control Center, Airway Facilities Sector, Southwest Region, Fort Worth, Texas, 3 FLRA 544 (1980).

The Authority, like the Federal courts, will accord an arbitrator's interpretation of a submission agreement and an arbitrator's formulation of the issues submitted in the absence of a stipulation the same substantial deference accorded an arbitrator's interpretation and application of the collective bargaining agreement. For example, Mobil Oil Corp. v. Independent Oil Workers Union, 679 F.2d 299 (3d Cir. 1982). Similarly, both the Authority and Federal courts have consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies. For example, U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Lexington, Kentucky and American Federation of Government Employees, Local 817, 21 FLRA No. 108 (1986); IAM District 776 v. Texas Steel Co., 639 F.2d 279 (5th Cir. 1981).

Nevertheless, both the Authority and Federal courts in private sector cases have indicated that in determining whether arbitrators have exceeded their authority, it is a fundamental principle that arbitrators must confine their decisions and possible remedies to those issues submitted to arbitration for resolution. See National Center for Toxicological Research; Texas Steel Co., 639 F.2d 279; IAM District 776 v. Texas Steel Co., 538 F.2d 1116 (5th Cir. 1976), cert. denied, 429 U.S. 1095 (1977). Arbitrators must not dispense their own brand of industrial justice. Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); see Naval Undersea Warfare Engineering Station, Keyport, Washington and International Association of Machinists and Aerospace Workers, Local 282, 22 FLRA No. 96 (1986).

Applying these principles to this case, we conclude that the Arbitrator exceeded his authority when he failed to confine his decision and any possible remedy to the issues submitted as he unambiguously framed them. The Arbitrator clearly specified the issue on the merits to be whether the grievant's termination was in violation of the collective bargaining agreement or applicable law and regulation and, if so, what remedy appropriate. When the Arbitrator answered precisely that issue by concluding that the grievant's termination did not violate the agreement or any applicable law and regulation, the Arbitrator had decided the merits of the issue submitted to him. By further ruling that the grievant be informed of and be allowed to apply for agency vacancies and directing the remedial relief set forth in paragraph 3 of the award, the Arbitrator exceeded his authority by deciding, and awarding a remedy concerning an issue not submitted to arbitration. Furthermore, nothing in the Arbitrator's framing of the issue or the record before the Authority indicates that the evidence and testimony referred to by the Arbitrator in awarding the relief set forth in paragraph 3 were elicited for other than the purpose of resolving the precise issue submitted to the Arbitrator of whether the grievant's termination was improper. Arbitrators may legitimately bring their judgment to bear in reaching a fair resolution of a dispute as submitted to or formulated by them, but they may not decide matters which are not before them. By awarding the grievant remedial relief beyond the scope of the matter submitted, the Arbitrator exceeded his authority and the award must be modified accordingly.

Although we conclude that the award must be modified because the Arbitrator exceeded his authority, we are constrained to note that the portion of the award which we modify is quite reasonable. All the Agency was asked to do was to notify the grievant of job openings for which he might apply. The grievant had worked for the Agency for nearly five years at the time his appointment was terminated, and was found to be a "valuable" employee by the Agency's own representative. That representative also found that the grievant's problems in clinical situations dealing with stress at the Vet Center were due to the "significant stress" he continued to suffer. Implementation of the Arbitrator's award would have taken only minimal effort on the part of the Agency and, indeed, would have demonstrated the Agency's concern and commitment to its mission.

V. DECISION

For the reasons stated above, we find that the award is deficient and modify the award by striking paragraph 3.[2/]

Issued, Washington, D.C. December 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

[2/] In view of this decision, it is not necessary to address the Agency's other exception to the award. Also in view of this decision and under established precedent of the Authority, no basis is provided for awarding the Union and the grievant attorney fees under the Equal Access to Justice Act and the Union's request for attorney fees is therefore denied. See United States Customs Service and National Treasury Employees Union, 22 FLRA No. 68 (1986).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 3097

Union

and

Case No. 0-NG-1100

DEPARTMENT OF JUSTICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of three Union proposals.

II. Preliminary Issue: Whether the Union Waived Its Right to Bargain

The disputed proposals were submitted by the Union in response to the Agency's decision during the term of the parties' agreement to reorganize part of the Justice Management Division. The Agency contends that the Union waived its right to bargain over the impact and implementation of the reorganization in Article 20 of the parties' agreement, and that the Agency's sole obligation is to notify the Union of the reorganization and consult with it concerning efforts to minimize the adverse effects on employees. The Union contends that it has not waived any of its bargaining rights and that the Agency is obligated under the parties' agreement to negotiate concerning the impact of the reorganization.

The record in this case fails to provide any basis for substantiating the Agency's assertion that the Union waived its right to bargain over the matters in dispute. Further, to the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case, these issues may be raised in other appropriate proceedings. See American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302, 306 n.6 (1984).

III. Union Proposal 1

The FLRA Members disagree over the negotiability of this proposal. The majority opinion on part 1 of Proposal 1 is on page 5 of this decision; Chairman Calhoun's separate opinion is on page 9. The majority opinion on part 2 of the proposal is on page 10; Member McKee's dissent is on page 15.

IV. Union Proposal 2

The FLRA Members disagree over the negotiability of this proposal. The majority opinion on Proposal 2 is on page 11 of this decision; Member McKee's separate opinion is on page 15.

V. Union Proposal 3

> Any employee who has a disciplinary action based upon poor performance within the previous organization shall have that disciplinary action held in abeyance for 120 days. At the end of that time, the disciplinary action will be re-evaluated under new operating procedures to assess the necessity of continuing said action.

A. Positions of the Parties

The Agency contends that Union Proposal 3 is unrelated to the adverse impact on employees from the reorganization and, therefore, exceeds the scope of its obligation to bargain concerning that impact. The Agency further argues that, in delaying a disciplinary action for 120 days, the proposal conflicts with 5 U.S.C. § 4303 which requires a final decision to be issued within 30 days of the date a performance-based adverse action is proposed. Additionally, the Agency contends that the proposal would improperly condition its rights under section 7106(a)(2)(A) upon a 120-day trial period. It argues that the proposal directly concerns the exercise of the Agency's rights and does not, therefore, constitute a procedure. It claims that the proposal could require it to retain an employee in a position for the 120-day period even though the Agency has determined that the employee's performance constitutes a danger to its operations or to other employees. Finally, the Agency contends that the proposal violates 5 U.S.C. § 7511(a)(1)(A) in that it makes no exception for the removal of probationary employees who could potentially complete their probationary periods during the 120 days.

The Union disputes the Agency's contentions, and argues that Proposal 3 constitutes a procedure that does not prevent the Agency from acting at all. The Union claims that the reorganization could result in improved performance because of a more efficient and effective structure. It argues that performance-based adverse actions should therefore be delayed so that employees' post-reorganization performance may be taken into account in deciding whether to proceed with the proposed action.

B. Analysis and Conclusions

1. The Agency's Assertions Concerning the Obligation to Bargain

The record in this case fails to provide a basis for substantiating the Agency's assertion that Union Proposal 3 exceeds the scope of its duty to bargain over the impact of the reorganization. See above discussion at section II of this Decision. Factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case should be raised in other appropriate proceedings.

2. The Proposal Conflicts with 5 U.S.C. § 4303

Union Proposal 3 would require the Agency to delay a performance-based adverse action for 120 days so that an employee may be given a chance to demonstrate improved performance as a result of the reorganization. We find, in agreement with the Agency, that the 120-day delay could prevent the Agency from disciplining an employee for unacceptable performance under 5 U.S.C. § 4303.

Under subsection (b) of section 4303, an employee is entitled to 30 days advance notice of a proposed performance-based adverse action. The notice period may be extended for no more than 30 days pursuant to internal agency regulation, and for an additional period only in accordance with regulations issued by the Office of Personnel Management (OPM).*/ This notice period is the period under section 4303 during which an employee may demonstrate improved performance so as to render the proposed adverse action unnecessary. See 5 U.S.C. § 4303(d). Subsection (c) provides that the decision regarding the adverse action shall be made within 30 days after the expiration of the notice period, that is, after the employee has had an opportunity to demonstrate improved performance.

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*/ The OPM regulation is set forth at 5 C.F.R. § 432.204(b) and provides that the notice period may be further extended only with prior OPM approval.

An agency must, therefore, complete a performance-based adverse action within 90 days of the date notice is given to the employee. Since Union Proposal 3 would require the adverse action to be delayed for 120 days it is inconsistent with 5 U.S.C. § 4303 and is outside the duty to bargain under section 7117(a)(1) of the Statute. In view of this decision, it is unnecessary for us to decide whether Proposal 3 would also violate management's right to discipline employees under section 7106(a)(2)(A) or require the Agency to provide additional procedural protections to probationary employees in violation of 5 U.S.C. § 7511.

VI. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, the Union's petition for review as to Union Proposal 3 is dismissed.

Issued, Washington, D.C., December 15, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

Union Proposal 1

(Part 1)

> Training opportunities will not be diminished nor will previous training be invalidated as a result of the reorganization. [Part 1 of the proposal is underscored.]

The Agency contends that Part 1 of the Union's proposal would require it to provide the same training opportunities that it currently provides, in violation of its right under section 7106(a)(2)(B) to assign work. It argues that the proposal would also violate Federal Personnel Manual (FPM) Chapter 213, Appendix A, paragraph A-2(a) and 5 U.S.C. §§ 4100(a)(2) and 4101(4) by requiring it to provide training that may not be related to an employee's new duties. The Union disputes the Agency's contentions. It argues that Part 1 of Proposal 1 is an appropriate arrangement. The Union contends that this part of the proposal is similar to a proposal requiring management to provide training for employees to qualify for new positions which the Authority found to be an appropriate arrangement in American Federation of Government Employees, AFL-CIO, Social Security Local No. 1760 and Department of Health and Human Services, Social Security Administration, 9 FLRA 813 (1982) (Union Proposal 2).

Majority Opinion

1. Part 1 of Union Proposal 1 Directly Interferes with the Agency's Right to Assign Work

The Authority has consistently held that providing training to employees is encompassed within management's right under section 7106(a)(2)(B) to assign work. See National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588, 590-91 (1981) (Union Proposals I through III). Part 1 of the Union's proposal would prohibit the Agency from reducing training opportunities as a result of the reorganization. That is, the proposal would require the Agency to provide the same number of training opportunities for unit employees that it provided before the reorganization. Since Union Proposal 1 would require the Agency to exercise its right to assign work by providing employees with a specific amount of training, we find that the first part of the proposal would directly interfere with that right.

The Agency has not demonstrated that the first part of the proposal also violates FPM Chapter 213, Appendix A, paragraph A-2(a) and 5 U.S.C. §§ 4109(a)(2) and 4101(4). Nothing in the Union's proposal would require the Agency to provide employees with training which is unrelated to the duties of their positions. The proposal does not require the Agency to provide employees with the same training courses it provided in the past. Rather, Union Proposal 1 is concerned with maintaining the current amount of training opportunities. Accordingly, we reject the Agency's contention.

2. Part 1 of the Proposal Constitutes an Appropriate Arrangement

After this case was filed, the Authority issued National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986). In that case, we stated that we will determine whether a proposed arrangement for employees adversely affected by the agency's exercise of its section 7106(a) or (b)(1) rights is "appropriate" for negotiation within the meaning of section 7106(b)(3), or whether it is inappropriate because it would "excessively interfere" with the exercise of management's rights.

In determining whether a proposal excessively interferes, the Authority indicated that as a threshold matter it would examine the record in each case to determine whether a proposal was in fact intended to be an arrangement for employees adversely affected by management's exercise of its rights. The Authority stated that it would look to "the effects or foreseeable effects on employees which flow from the exercise of those rights." Id., slip op. at 8. This threshold consideration excludes as appropriate arrangements proposals interfering with management's rights which address purely speculative or hypothetical concerns, or which are otherwise unrelated to management's exercise of its reserved rights. However, where an adverse effect on employees is reasonably foreseeable based on the record, the Authority will reach the question of whether the proposal excessively interferes.

The record in this case indicates that the Union has more than merely a hypothetical or speculative concern with diminished training opportunities flowing from the Agency's reorganization. The Agency states that as a result of the reorganization "an employee's new duties may not be sufficiently related to certain course work to permit reimbursement. . . . [W]ork assignments may be changed by . . . the reorganization to an extent where a course would no longer be relevant to the nature of the work performed." Agency Statement of Position at 5. The Agency itself thus recognizes the reasonable possibility that employee training opportunities may diminish as a result of the reorganization.

As to whether part 1 of the proposal excessively interferes with management's exercise of its rights, the Authority finds that the first part of the Union's proposal is to the same effect as the proposal that the Authority found to constitute an appropriate arrangement in the case cited by the Union, American Federation of Government Employees, AFL-CIO, Social Security Local No. 1760 and Department of Health and Human Services, Social Security Administration, 9 FLRA 813 (1982) (Union Proposal 2). The Authority found that the proposal in that case merely required the agency to provide training opportunities but did not mandate that training occur during duty hours, or otherwise interfere with the agency's discretion concerning the methodology, scheduling, duration, type, content, or other characteristics of the training itself. Similarly, the first part of Union Proposal 1 here merely requires the Agency to continue to provide the same amount of training opportunities that it provided prior to the reorganization but leaves to the Agency's discretion decisions as to the type of training and when it is to occur. Consequently, for the reasons set forth more fully in Department of Health and Human Services, we find that the first part of Union Proposal 1 does not excessively interfere with management rights and is an appropriate arrangement within the meaning of section 7106(b)(3).

Conclusion

For the reasons set forth above, we conclude that the part of Union Proposal 1 providing that training opportunities not be diminished as a result of the reorganization constitutes an appropriate arrangement and is within the duty to bargain.

Order

The Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Part 1 of Union Proposal 1.*/

Issued, Washington, D.C., December 15, 1986.

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding the proposal to be within the duty to bargain the Authority makes no judgment as to its merits.

Opinion of Chairman Calhoun, Concurring in Part and Dissenting in Part

I concur in that part of the decision finding that Part 1 of Union Proposal 1 directly interferes with management's right under section 7106(a)(2)(B) to assign work. I cannot agree, however, that Part 1 of the proposal constitutes an appropriate arrangement within the meaning of section 7106(b)(3).

For the Authority to consider whether a proposal is an appropriate arrangement, a union must first demonstrate that employees have been or will be adversely affected by management's exercise of its rights and that the Union's proposal is intended to mitigate those adverse effects. National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4, slip op. at 3 (1986). In cases filed before our decision in Kansas Army National Guard, such as this one, we will examine the record to determine whether any adverse effects have been identified or whether such effects are identifiable based upon the nature of the matter in dispute.

The Union in this case has not identified any adverse effects flowing from the reorganization to which Part 1 of Proposal 1 is related and none are apparent from the record. Further, the Agency's statements cited by the majority do not show that the reorganization will adversely affect the amount of training opportunities available to employees. Rather, the Agency's statements merely reflect the fact that, under law and regulation, training paid for by an agency must be related to an employee's duties. Since the reorganization may result in employees performing new duties, the Agency may not be authorized to pay for the exact same courses it provided before the reorganization. In the absence of any showing that employees have been or will be adversely affected, the proposal cannot be considered an "arrangement" designed to mitigate adverse effects. As a result, we cannot determine whether the proposed arrangement "excessively interferes" with the exercise of management's rights. Accordingly, I disagree with that part of the Majority Opinion finding Part 1 of Proposal 1 to be an appropriate arrangement.

Issued, Washington, D.C., December 15, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Union Proposal 1

(Part 2)

> Training opportunities will not be diminished nor will previous training be invalidated as a result of the reorganization. [Part 2 of the proposal is underscored.]

The Agency contends that if Part 2 of Union Proposal 1 is intended to prohibit the Agency from changing the duties of a position so that qualifying training for the position would remain the same, the proposal violates its right to assign work and limits its ability to conduct a reorganization in violation of management's rights to determine its organization and the personnel by which agency operations will be conducted. If the proposal is intended to prohibit the Agency from changing the qualification requirements for higher level positions, the Agency contends that the proposal violates its right under section 7106(a)(2)(C) to make selections for appointments and would affect nonunit positions. The Union contends that the continuing validity of previous training should not be affected by the type of reorganization proposed by the Agency. It further argues that its proposal does not prevent the Agency from changing position descriptions.

Majority Opinion

The Authority finds, in agreement with the Agency, that Part 2 of the Union's proposal concerning the validity of previous training would prevent the Agency from changing the job requirements of a specific position as a result of the reorganization. That is, if certain training had been required to qualify an employee to perform the duties of a position prior to the reorganization, the proposal would require the same training to still qualify an employee to perform the duties of the position after the reorganization. Part 2 of the proposal would, therefore, prohibit the Agency from assigning additional duties to an employee or position if additional training were required to perform those duties. Such a prohibition on the assignment of duties directly interferes with management's right under section 7106(a)(2)(B) to assign work and is outside the duty to bargain. See National Federation of Federal Employees, Local 1622 and Department of the Army, Headquarters, Vint Hill Farms Station, Warrenton, Virginia, 16 FLRA 578, 580-81 (1984) (Union Provision 2).

In view of this determination, it is unnecessary for us to decide whether Part 2 of Union Proposal 1 also violates the Agency's rights to determine its organization, determine the personnel by which its operations will be conducted, or make selections for positions. We also need not decide whether the proposal would determine conditions of employment of nonunit employees.

Union Proposal 2

> In the event that any of the newly established organizational components shall be identified for contracting out, and such components have 10 (ten) or fewer employees in the new organization but previously had been part of an activity of more than 10, a cost-benefit analysis will be conducted and given to the Union prior to impact bargaining and the signing of a contract.

The Agency contends that Union Proposal 2 is unrelated to the adverse impact on employees from the reorganization and, therefore, exceeds the scope of its obligation to bargain concerning that impact. The Agency further argues that the proposal violates its right under section 7106(a)(2)(B) of the Statute to make determinations with respect to contracting out. It also contends that the proposal would require it to undertake a cost-benefit analysis for units having ten or fewer employees even though OMB Circular A-76, which governs contracting out determinations, only requires such an analysis where more than ten employees would be affected. The Agency also argues that providing the Union with a copy of any cost-benefit analysis done by the Agency would be relevant only to the decision to contract out itself and not to the impact of that decision on employees. Finally, the Agency contends that the proposal would require it to assign employees to conduct the cost-benefit analysis in violation of its right to assign work under section 7106(a)(2)(B) or to "undertake a work project" under section 7106(b)(1).

The Union contends that Proposal 2 is related to the adverse effect on employees of the reorganization in that the reorganization resulted in smaller work units and made certain units "commercial activities" subject to being contracted out. The Union concedes that its proposal requires more of the Agency than is required by Circular A-76, but argues that the Circular does not prohibit the negotiation of additional procedures. The Union claims that its proposal does not directly interfere with the Agency's ability to make determinations with respect to contracting out and, therefore, constitutes a negotiable procedure within the meaning of section 7106(b)(2). The Union also disputes the Agency's contentions that the proposal does not concern the impact of a decision to contract out and that the proposal violates the Agency's right to assign work.

Majority Opinion

1. The Agency's Assertions Concerning the Obligation to Bargain

The record in this case fails to provide a basis for substantiating the Agency's assertion that Union Proposal 2 exceeds the scope of its duty to bargain over the impact of the reorganization. See the discussion at section II of this Decision. Factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case should be raised in other appropriate proceedings.

2. The Union's Proposal Interferes with the Agency's Right to Make Contracting Out Determinations

Union Proposal 2 would require the Agency to (1) conduct a cost-benefit analysis as part of its process of determining whether to contract out the function of an organizational component having ten or fewer employees if that component had more than ten employees prior to the reorganization; and (2) provide the Union with a copy of the analysis prior to bargaining over the impact of the decision to contract out and signing the contract. As for the latter point, the Agency interprets the provision as requiring it to conduct the analysis and engage in impact bargaining "prior to entering into an outside contract for the performance of employee work." Agency Statement of Position at 8. The Union does not contradict the Agency's interpretation. We find that the proposal is to the same effect as the proposal that the Authority found to be outside the duty to bargain in National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574, 575-78 (1981) (Union Proposal 1), enforced sub nom. National Federation of Federal Employees, Local 1167 v. FLRA, 681 F.2d 886 (D.C. Cir. 1982).

The proposal in Homestead Air Force Base would have prohibited the agency from contracting out work where it could be demonstrated that the work could be performed more economically and effectively "in house," and required the agency to provide the union with "milestone charts" concerning the feasibility of contracting out certain functions. The Authority found that the first part of the proposal would place a substantive limitation on management's right under section 7106(a)(2)(B) to make determinations with respect to contracting out. The Authority stated that, even if the agency were required to comply with the proposed substantive limitation because it was also contained in OMB Circular A-76, the proposal would nevertheless violate the agency's rights by placing a contractual limitation on the exercise of those rights.

As to the second part of the proposal in Homestead Air Force Base, the Authority found that the "milestone charts" were an essential part of the agency's deliberative process in making a contracting out determination. Since the agency's right under section 7106(a)(2)(B) to make determinations with respect to contracting out encompasses both the deliberation process leading to the determination and the determination itself, the Authority held that the second part of the proposal directly interfered with the agency's right. Similarly, Union Proposal 2 here, by requiring the Agency to conduct the cost-benefit analysis as part of its process of determining whether to contract out certain functions, and furnish a copy to the Union prior to making a contracting out determination, would place a substantive restriction on the Agency's exercise of its reserved right and interfere with the Agency's deliberative process. Consequently, for the reasons set forth more fully in Homestead Air Force Base, we find that Union Proposal 2 would directly interfere with the Agency's right to make determinations with respect to contracting out and is not a negotiable procedure under section 7106(b)(2).

Member McKee disagrees with our conclusion that the portion of the proposal requiring the Agency to furnish a copy of a cost-benefit analysis to the Union is nonnegotiable. In our view, the parts of the proposal concerning conducting the analysis and providing a copy of it to the Union are inextricably linked. In fact, severing the parts of the proposal could result in the Union negotiating for copies of nonexistent reports. Therefore, we believe that in this case our colleague's concerns are hypothetical.

In view of this determination, we need not determine whether the Union's proposal is also inconsistent with OMB Circular A-76 or with management's rights to assign work or "undertake a work project."

Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, the petition for review as to Part 2 of Union Proposal 1 and as to Union Proposal 2 is dismissed.

Issued, Washington, D.C., December 15, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

Opinion of Member McKee

Union Proposal 1, Part 2

I disagree with the finding that part 2 of Proposal 1, which provides that the previous training of employees will not be invalidated as a result of the reorganization, would prevent the Agency from changing the job requirements of a position after the reorganization. I also disagree with the finding that the proposal would prohibit the Agency from assigning additional duties to an employee or position if additional training was required to perform those duties. In my view, the plain language of the proposal does not support either finding. Moreover, the Union expressly disavows any such intent. In its response to the Agency's statement of position, the Union expressly maintains that in the event that the Agency needed to change position descriptions, the Agency could do so under the disputed proposal, even if the change would invalidate the continued effectiveness of employees' prior training. Union Response at 6. The Union also acknowledges management's right to assign work, and contends that the proposal is not intended to prevent the Agency from assigning duties after the reorganization. Response at 6. Based on the Union's interpretation of its proposal, which is fully consistent with the plain language, I find that the proposal does not directly interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute. I conclude that the proposal is within the duty to bargain.

Union Proposal 2

I concur in the preliminary conclusion that any factual issues between the parties concerning the duty to bargain in this case should be raised in other appropriate proceedings.

I also agree with the finding that by requiring the Agency to conduct a cost-benefit analysis as part of its process of deciding whether to contract out, the proposal would place a substantive limitation on management's exercise of its right under section 7106(a)(2)(B) of the Statute to make determinations with respect to contracting out. On that basis, I concur in the conclusion that the proposal directly interferes with management's right to make contracting out determinations and that it is not a negotiable procedure under section 7106(b)(2) of the Statute.

However, I must disagree with the separate conclusion of the majority that the second part of the proposal, which would require the Agency to provide the Union with a copy of a cost-benefit analysis, would interfere with management's deliberative process in determining whether to contract out. My reasons are as follows.

First, I disagree with the majority's finding that the disputed portion of the proposal would have the same effect as part of a proposal the Authority found to be nonnegotiable in Homestead Air Force Base, 6 FLRA 574, 575-78 (1981) (Proposal I). In Homestead, the Authority found that part of the proposal which would have required the agency to furnish the union with copies of its "milestone charts" was outside the duty to bargain. The "milestone charts" in Homestead were described as "internal management recommendations." 6 FLRA 577. Clearly, "internal management recommendations" are an integral part of management's deliberative process. In this case, however, the cost-benefit analysis referred to is not an internal management recommendation. Rather, it is the equivalent of the cost comparison required in contracting out actions under Office of Management and Budget (OMB) Circular A-76. Union Response to Agency Statement of Position at 6-9. Recognizing that the contracting out contemplated by the Union's proposal is not subject to the requirements of OMB Circular A-76, it is still apparent that providing the Union with a copy of a comparison of the estimate of the cost of Government performance of an activity to the cost of performance by a prospective contractor is not the same as providing the Union with an internal management recommendation.

Moreover, the Authority has indicated in a number of contracting out disputes that collective bargaining agreement provisions requiring the agency to provide the union with certain information used by management in the contracting out determination process, such as bid solicitation packages and statements of work to be performed, were not inconsistent with management's right to make such determinations under section 7106(a)(2)(B). U.S. Army Communications Command Agency, Redstone Arsenal and American Federation of Government Employees, Local 1858, 23 FLRA No. 22, slip op. at 3 (1986); United States Army Communications Command, Fort McClellan and Local No. 1941, American Federation of Government Employees, AFL-CIO, 23 FLRA No. 23, slip op. at 3 (1986); Department of the Army, Oakland Army Base and American Federation of Government Employees, Local 1157, 23 FLRA No. 26, slip op. at 3 (1986).

I also disagree with the finding of the majority that the second part of the proposal in dispute in this case would require the Agency to furnish the Union with a copy of the cost-benefit analysis prior to making any contracting out determination and, therefore, that like the proposal in Homestead, the proposal in this case would directly interfere with management's deliberative process. The proposal does not require that a copy of an analysis be given to the Union prior to making the contracting out decision. Rather, the proposal expressly requires that the analysis be provided to the Union "prior to impact bargaining and the signing of a contract" both of which events would occur after a determination to contract out.

Finally, as the Union maintains in its response to the Agency's statement of position, Response at 9, and as the Authority noted in its decision in Homestead, 6 FLRA 573 n.6, the Union may be entitled to any cost-benefit analysis under section 7114(b)(4)(B) of the Statute for impact bargaining purposes, if the information is "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of bargaining[.]"

For those reasons, I find that the second part of the proposal does not substantively limit or in any way interfere with either management's deliberative process or its ability to make contracting out determinations. If the proposal had been limited to requiring the Agency to provide the Union with a copy of a cost-benefit analysis in the event that management decided to conduct such an analysis, the proposal would, in my opinion, be within the duty to bargain. However, as indicated above, since the second part of the proposal is not severable from the first part and the first part is contrary to section 7106(a)(2)(B) of the Statute, the entire proposal must be found to be nonnegotiable.

Issued, Washington, D.C., December 15, 1986.

Jean McKee

Jean McKee, Member

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1501

Union

and Case No. O-NG-830

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL
SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of three Union proposals.[1] The Union submitted the proposals in response to the Agency's announcement of its intentions to reassign employees to work on different types of cases. At the time the Union filed this appeal it also filed an unfair labor practice charge (ULP) concerning the Agency's actions. It elected to have the ULP processed first. The ULP was decided in Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 22 FLRA No. 10 (1986).

II. Procedural Issues

A. The Petition Is Timely

The Agency argues that this appeal, filed on April 22, 1983, is untimely based on a written allegation of nonnegotiability which it gave the Union on April 1, 1983. This written allegation had not been requested by the Union and did not start the time limits for an appeal . See, for example, International Brotherhood of Electrical Workers, AFL-CIO, Local 121 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 10 FLRA 198 (1982). The Union presented revised proposals on April 7, 1983. The appeal is timely filed from the Agency's written allegation of nonnegotiability as to those revised proposals dated April 8, 1983.

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[1] The Union withdrew two other proposals. They will not be considered in this decision.

B. The Alleged Defect in the Service of the Appeal Is Not Fatal

The Agency asserts that the Authority should dismiss the appeal because the Union did not adequately serve it with the initial petition. There is no question that the Union's initial filing was flawed. However, when the Authority advised the Union of the deficiencies in its petition, it remedied the deficiencies in the time set by the Authority. In its supplemental submission, the Union indicated that it had served representatives of the Agency with "a copy of the petition for review and related documents." The Agency asserts that appropriate officials have, in fact, not been served with the initial submission.

Two factors are important to this issue. The first is that the Union's initial filing contained no substantive information about the appeal which was not in the supplemental filing. In view of the defects in the initial filing and the fact that the Union's supplemental filing contained all the information relevant to the appeal we find that, even assuming that the original filing was not served on the appropriate agency officials in a timely manner, the Agency suffered no real disadvantage. The second consideration is that the negotiability issues which are the subject of this appeal were also involved in parallel proceedings--the ULP complaint referred to above.[2] In the hearing conducted on the complaint the Agency submitted as evidence the Union's initial filing in this case (Respondent's Exhibit No. 1 in the proceedings leading to Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 22 FLRA No. 10 (1986)). Moreover, the negotiability of the Union's proposals which are the subject of this case was litigated in the context of determining whether a ULP had occurred in that case. See Department of Health and Human Services, 22 FLRA No. 10 at 103-105 and 115-116. In these circumstances we find, even assuming that technically the Agency was not properly served with the initial filing, there was no prejudice to the Agency and dismissal of the appeal on that basis is not warranted.

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[2] We hereby take official notice of the decision and record in that proceeding. See section 2429.5 of the Authority's Rules and Regulations. See also Decision and Order on Motion for Reconsideration in American Federation of Government Employees, Local 1760, AFL-CIO and Department of Health and Human Services, Social Security Administration, 15 FLRA No. 172 (1985), issued June 19, 1985, Report of Case Decisions, Number 308.

C. Mootness

The negotiability of Union Proposals 1 and 3 was decided in Department of Health and Human Services, 22 FLRA No. 10 at 115-16. The Agency did not file exceptions to the Administrative Law Judge's conclusions that these proposals were negotiable. These conclusions were adopted by the Authority. In the circumstances of this case, therefore, further consideration of proposals 1 and 3 is unwarranted and the Union's petition for review of them is dismissed as moot.

III. Union Proposal 2

> 3. The change will be made in such a manner as to not unfairly disadvantage any particular employee or impose any unreasonable or unnecessary workload burden on any particular employee in the SSI Claims Unit.

A. Positions of the Parties

Neither party makes any argument specific to this proposal. The Union's general arguments are that its proposal: Is procedural in nature; constitutes arrangements for adversely affected employees; and merely establishes nonquantitative criteria by which the Agency's actions can be evaluated. The Agency generally argues that the proposal interferes with its rights to direct employees and to assign work.

B. Analysis and Conclusions

1. The Proposal Is Not Procedural in Nature

The Union offers no explanation as to how this proposal is intended to be administered. On its face, however, the proposal is not limited to prescribing general, nonquantitative criteria by which Agency actions will subsequently be evaluated. Rather, it prescribes specific criteria--"unreasonable or unnecessary workload burden"--which the Agency must observe in deciding which work will be assigned to employees. In the factual context established by the supporting documents submitted in conjunction with the appeal in this case and the findings in the decision in Department of Health and Human Services, 22 FLRA No. 10, we conclude that the Union intends this proposal to produce a particular result--to dictate to the Agency the specific employees to be assigned to process various types of cases. That is, insofar as appears from the record, the Union disapproved of the Agency's choices as to the employees who would be assigned to particular types of cases and desired to impose on the Agency its judgments as to the appropriate choices for such assignments. In view of these facts and the specific nature of the criteria contained in this proposal, we conclude that the proposal would directly interfere with substantive management decisions as to the assignment of work. See National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 6 FLRA 508 (1981) (Proposal V). Thus, it is not merely procedural in nature. See Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140, 1152 (D.C. Cir. 1981), in which the Court distinguished between nonnegotiable proposals which, while cast in procedural language, directly interfere with management rights and negotiable ones which are "more nearly pure procedures" and which have less direct substantive repercussions.

2. The Proposal Does Not Constitute an Appropriate Arrangement

To determine whether this proposal, which we have concluded directly interferes with the exercise of management rights, constitutes a negotiable appropriate arrangement within the meaning of section 7106(b)(3), it is necessary to determine whether the proposal's interference with the exercise of those rights is "excessive." National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986). In making such a determination, we examine the record to ascertain whether the proposal is in fact intended to be an arrangement for employees adversely affected by management's exercise of its rights. If we conclude that the proposal is so intended, we then determine whether the arrangement is appropriate or inappropriate based on whether or not it excessively interferes with management rights.

First, we find that the Union intended the proposal to be an arrangement for employees adversely affected by the Agency's exercise of its rights to assign work. As discussed above, the record establishes that this proposal seeks to ameliorate the effect of management's decisions concerning work assignments by imposing substantive criteria intended to dictate the specific employees to be assigned to process the various types of cases. It would, thus, effectively eliminate the Agency's discretion to determine the particular employee to whom duties will be assigned. It would, in other words, substitute the Union's judgments as to the appropriateness of assignments for those of management. It would dictate that assignments be made without regard to valid, work-related considerations. *See National Treasury Employees Union and Internal Revenue Service, Dallas District*, 13 FLRA 48 (1983) (Proposal 1). In totally eliminating the Agency's discretion to make these necessary judgments relating to work assignment, the proposal excessively interferes with management's right under 7106(a)(2)(B) to assign work. *American Federation of Government Employees, Local 2185 and Tooele Army Depot, Tooele, Utah*, 23 FLRA No. 25 (1986) (Proposal 1).

IV. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, the Union's petition for review is dismissed.

Issued, Washington, D.C. December 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 997

Union

and Case No. 0-NG-777

DEPARTMENT OF THE AIR FORCE,
MAXWELL AIR FORCE BASE, ALABAMA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues as to the negotiability of a single Union proposal. We find that the proposal is negotiable.[1]

II. Union Proposal

> The employer will absorb seventy-five (75) percent of the cost of the Health Insurance, Life and AD&D.

III. Positions of the Parties

The Agency contends that the proposal is outside the duty to bargain because it does not concern conditions of employment of bargaining unit employees, affects employees outside the bargaining unit, interferes with its right under section 7106(a)(1) of the Statute to determine its "budget," and is inconsistent with an Agency regulation for which there is a compelling need. The Union disputes the Agency's contentions and asserts that the proposal is negotiable.

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[1] In finding this proposal is negotiable we make no judgment as to its merits.

IV. Analysis and Conclusions

In American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida, 24 FLRA No. 41 (1986) we held that nothing in the Statute, or its legislative history, bars negotiation of proposals relating to pay and fringe benefits insofar as (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency and (2) the proposals are not otherwise inconsistent with law, Government-wide rule or regulation or an agency regulation for which a compelling need exists. Based on that analytical framework, we held that the proposal in that case, which required the agency to pay up to 75 percent of the premium cost of health insurance for non-appropriated fund (NAF) employees, was within the duty to bargain.

In the present case as in Eglin Air Force Base the employees involved are NAF employees whose health insurance benefits are not established by law but are governed by Agency regulation. The proposal in this case is not materially different from the one in Eglin Air Force Base. It addresses employer contributions for life and accidental death and dismemberment [AD&D] insurance as well as those for health insurance; however, the Agency makes no arguments that a different disposition is warranted based on this distinction nor are any reasons for doing so otherwise apparent. In fact, as the Agency acknowledges, these additional matters like the health insurance benefits are governed not by Federal statute but by agency regulations.2/ In view of these materially identical circumstances, we conclude for the same reasons expressed in detail in Eglin Air Force Base as follows. First, this proposal concerns a condition of employment which is negotiable to the extent it is not inconsistent with applicable law and regulation. Second, the Agency has not sustained its claims that this proposal would determine conditions of employment for nonunit employees, interfere with management's right to determine its budget or conflict with an agency regulation for which a compelling need exists.

Consequently, for the same reasons as expressed in Eglin Air Force Base, this proposal is within the duty to bargain.

2/ See Agency Statement of Position at 4 and 9.

V. Order

The Agency shall upon request, or as otherwise agreed to by the parties, negotiate over the Union's proposal.

Issued, Washington, D.C., December 15, 1986.

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

Dissenting Opinion of Chairman Calhoun

I agree with the majority that the proposal at issue in this case is not materially different from the one in dispute in American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida, 24 FLRA No. 41 (1986). Therefore, I cannot join the majority for the reasons stated in my dissenting opinion in that case.

Jerry L. Calhoun, Chairman

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and

Case No. O-NG-983
19 FLRA No. 24

DEPARTMENT OF ENERGY

Agency

SUPPLEMENTAL DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The Authority issued its original decision in this case in 19 FLRA No. 24 and subsequently vacated its decision as to Union Proposal 2. This case concerns only the negotiability of that proposal. We find the proposal negotiable.

Union Proposal

> Article 22, Reduction in Force, Part II, Section 5
>
> The filling of any bargaining unit vacancy within the competitive area for which bargaining unit employees in that area who will be affected by RIF are eligible will be suspended from the date of the initial RIF notice to affected employees until the effective date of the RIF.

II. Positions of the Parties

The Agency contends that the proposal violates its right to hire under section 7106(a)(2)(A) because it prevents management from filling vacant positions. The Agency claims that, by preventing management from filling positions, the proposal would not allow employees to exercise their bumping and retreat rights under regulations issued by the Office of Personnel Management. The Agency argues that the proposal is neither a procedure nor an appropriate arrangement under section 7106(b)(2) and (3) of the Statute.

The Union states that its proposal would allow employees to take full advantage of bumping and retreat rights and other reassignment possibilities. The Union contends that the proposal only delays the filling of vacant positions until a reduction in force (RIF) has been carried out. It argues that the proposal is a negotiable procedure in that it does not prevent the Agency from acting at all.

III. Analysis

The Union's proposal would suspend the filling of any vacant bargaining unit position for which employees affected by a RIF would be eligible from the date a RIF notice is received by the affected employees until the effective date of the RIF action. The Union states that the proposal is intended to allow affected employees both to exercise their bumping and retreat rights and to take advantage of possible reassignment to such vacant positions. Union Response at 3. We accept the Union's interpretation and find that, contrary to the Agency's contentions, the proposal would not affect the rights of employees to bump and retreat into positions under regulations issued by the Office of Personnel Management and set forth at 5 CFR Part 351 (the OPM RIF Regulations).

If the Agency decides to fill a vacancy covered by the proposal during a RIF, the proposal only requires the Agency to either fill that vacancy with an eligible bargaining unit employee affected by the RIF or delay filling the vacancy until the RIF is over. Hence, the proposal merely delays management's exercise of its rights to select an employee from any appropriate source under section 7106(a)(2)(C)(ii) and, correlatively, to hire from outside the bargaining unit under section 7106(a)(2)(A). This delay only would occur in very limited circumstances when (1) there is a qualified individual in the bargaining unit, (2) that employee would be affected by the RIF, and (3) management decides not to select that employee.

From these facts, it is our conclusion that the proposal would not impose any substantive criteria on management's exercise of its rights. Rather, the proposal would establish a procedure for management to follow in exercising its rights--albeit one which, under the very narrow circumstances outlined above, would delay management's ability to select from appropriate sources other than the bargaining unit until after the RIF. Such a procedure is negotiable under section 7106(b)(2) because it delays but does not prevent management from acting at all to exercise its rights. American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA 153 (1979), enforced sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981). Therefore, we would not reach the question of whether the proposal is an "appropriate arrangement" under section 7106(b)(3).

This case is distinguishable from National Federation of Federal Employees, Local 1332 and Headquarters, U.S. Army Materiel Development and Readiness Command, Alexandria, Virginia, 3 FLRA 611 (1980), where the Authority held nonnegotiable a proposal requiring a hiring freeze because it was integrally related to management's right under section 7106(b)(1) to determine the numbers and types of employees assigned to an organizational subdivision. In that case the Authority found the proposal prevented the agency from hiring new employees of the requisite types and grades in sufficient number while the freeze was in effect. Unlike the proposal in U.S. Army Materiel Development and Readiness Command, the proposal in this case only delays the Agency filling a vacancy when the Agency decides not to select an eligible bargaining unit employee affected by the RIF. This proposal does not prevent the Agency from hiring additional employeees from outside the unit when there are no eligible employees within the unit. Consequently, this proposal does not affect the Agency's ability to determine the numbers and types of employees needed to perform its work.

While not disputed in this case, it is clear that unlike the proposal in the Authority's Decision and Order on Remand in American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 14 FLRA 801 (1984), affirmed in the Authority's Decision and Order on Motion for Reconsideration (July 11, 1985), affirmed sub nom. American Federation of

Government Employees, Local 2782 v. FLRA, No. 85-1562 (D.C. Cir. October 21, 1986), and cases based on that decision, the proposal in this case is not inconsistent with Requirement 4 of subchapter 1-4, chapter 335 of the Federal Personnel Manual (FPM). Requirement 4, which provides for an agency's right to fill positions from any appropriate source, applies to positions filled through merit promotion procedures. Requirement 4 does not apply to position changes permitted by reduction-in-force regulations. *See* subchapter 1-5(a)(5) and (b)(2) of FPM chapter 335. Since section 351.201(b) of the OPM RIF regulations gives an agency discretion to fill vacant positions during a RIF with affected employees, the vacant positions covered by the Union's proposal are not subject to the competitive procedures set forth in chapter 335 of the FPM.

A dictum in *National Federation of Federal Employees, Local 1450 and U.S. Department of Housing and Urban Development*, 23 FLRA No. 1 (1986) states otherwise and will not be followed. To the extent that the proposal in that case concerns position changes permitted by the RIF regulations, Requirement 4 would not apply to that proposal. Proposals which concern the filling of positions *after* the effective date of a RIF, however, even if the proposals concern employees adversely affected by the RIF, are subject to the provisions of chapter 335. *See American Federation of Government Employees, AFL-CIO, Local 2677 and Department of Health and Human Services, Office of Community Services*, 21 FLRA No. 22 (1986), *petition for review filed sub nom. AFGE, Local 2677 v. FLRA*, No. 86-1287 (D.C. Cir. May 19, 1986).

IV. Conclusion

For the reasons discussed above, we conclude that the Union's proposal is within the duty to bargain.*/

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*/ Chairman Calhoun concurs that the proposal is negotiable for the reasons set forth in his separate opinion. In finding the proposal to be within the duty to bargain, we make no judgment as to its merits.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Union Proposal 2.

Issued, Washington, D.C., December 15, 1986.

Henry B. Frazier III

Henry B. Frazier III Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

Opinion of Chairman Calhoun

In agreement with my colleagues, I find that the proposal is negotiable. However, I reach this conclusion based on a different analysis from that in the majority opinion.

1. Right to Select

If the Agency decides to fill a vacancy covered by the proposal during the period covered by the freeze, the Union's proposal would require the Agency to reassign an employee affected by the RIF who is eligible to the vacant position. Union Response at 3. In my view, this limitation would interfere with management's right under section 7106(a)(2)(C)(ii) to make selections for positions from any appropriate source. See National Federation of Federal Employees, Local 108 and U.S. Department of Agriculture, Arkansas State Office of the Farmers Home Administration, 14 FLRA 19 (1984) (first sentence of Proposal 5). I agree with my colleagues, for the reasons stated in the majority opinion, that the proposal is not inconsistent with Requirement 4 of subchapter 1-4, chapter 335 of the FPM.

2. Right to Hire

Management's right under section 7106(a)(2)(A) to hire from outside the agency constitutes one "appropriate source" from which an agency may make selections for positions. I find that the Union's proposal would limit the sources from which the Agency may fill vacant positions covered by the proposal. During the RIF, the Agency could only fill those positions with eligible employees who would otherwise be subject to the RIF. The Agency would be prevented during the RIF from exercising its right to hire from outside. If the Agency does fill the vacant position with an affected employee prior to the effective date of the RIF, it could no longer exercise its right to hire for that position from outside the Agency after the RIF. The proposal would therefore interfere with the Agency's right to hire employees. Consequently, I find that the proposal directly interferes with management's right to hire and does not constitute a procedure under section 7106(b)(2) of the Statute.

3. Appropriate Arrangement

We vacated our original decision as to this proposal because it relied upon the decision as to Union Proposal 1 in Association of Civilian Technicians, Montana Air Chapter and Department of the Air Force, Montana Air National Guard, Headquarters 120th Fighter Interceptor Group (ADTAC), 11 FLRA 505 (1983), which was reversed and remanded to the Authority by the U.S. Court of Appeals for the District of Columbia Circuit in Association of Civilian Technicians, Montana Air Chapter v. FLRA, 756 F.2d 172 (D.C. Cir. 1985). The D.C. Circuit's decision directed the Authority to determine whether Union Proposal 1, which also concerned a freeze on hiring during a RIF, constituted an appropriate arrangement under section 7106(b)(3) of the Statute. In its Decision and Order on Remand in Association of Civilian Technicians, Montana Air Chapter and Department of the Air Force, Montana Air National Guard, Headquarters 120th Fighter Interceptor Group (ADTAC), 20 FLRA No. 85 (1985), petition for review filed sub nom. Association of Civilian Technicians, Montana Air Chapter v. FLRA, No. 86-1057 (D.C. Cir. Jan. 23, 1986), the Authority found that Union Proposal 1 did not constitute an appropriate arrangement under section 7106(b)(3) because it excessively interfered with the agency's ability to provide the numbers and types of employees to perform the agency's work.

In view of the Agency's claim that the proposal is not an appropriate arrangement and the decision of the D.C. Circuit in Montana Air Chapter, I will consider whether the proposal in this case, which also concerns a hiring freeze, constitutes an appropriate arrangement.*/ The proposal was intended as an arrangement for employees adversely affected by the Agency's exercise of its right to layoff employees. The event giving rise to the proposed arrangement--a RIF--is a matter which significantly affects employees but is caused by circumstances which are not within their control. The proposed arrangement would benefit employees by ensuring that employees who would otherwise be separated because of a RIF are placed in vacant positions for which they are eligible before the Agency seeks outside applicants.

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*/ In National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), we set forth the factors we will consider in determining whether a proposed arrangement for employees adversely affected by an agency's exercise of its section 7106(a) or (b)(1) rights is "appropriate" for negotiation within the meaning of section 7106(b)(3), or whether it is inappropriate because it would "excessively interfere" with the exercise of management's rights.

Regarding the burden the arrangement would place on the Agency's exercise of its rights, as discussed above, the proposal would interfere with the Agency's rights to hire and to make selections from any appropriate source. Although the proposal would interfere with the Agency's rights to hire and select, I find that the interference with the Agency's ability to carry out its mission would not be substantial. The proposal would not require the Agency to fill a vacant position if it chooses not to do so. Also, if the Agency decides to fill a vacancy, the proposal would not require it to fill the position with an employee it has not found to be qualified to perform the duties of that position. While the Agency would be prohibited from seeking applicants from outside the competitive area during the RIF, the Agency still has discretion to either fill the vacancy with an eligible employee from within the affected area or fill it from any appropriate source after the effective date of the RIF. By contrast, the proposal in Montana Air Chapter which we found to excessively interfere with management's rights would have prevented management from filling vacancies even if there were no qualified employees available. Consequently, in my view, the Union's proposal does not excessively interfere with the Agency's exercise of its rights and constitutes an appropriate arrangement under section 7106(b)(3).

Issued, Washington, D.C., December 15, 1986.

Jerry L. Calhoun, Chairman

9/Case 411

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 411 REPORT OF CASE DECISIONS December 17, 1986

UNFAIR LABOR PRACTICE CASES

24 FLRA No. 53 (December 15, 1986)

Department of the Army, U.S. Army Medical Department Activity (Noble Army Hospital) Fort McClellan, Alabama, Case No. 4-CA-50151

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24 FLRA No. 59 (December 17, 1986)

Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Southeast Regional Office, Atlanta, Georgia and National Treasury Employees Union, Case No. 4-CA-113824

24 FLRA No. 56 (December 17, 1986)

Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey and American Federation of Government Employees, Local 1012, AFL-CIO, Case No. 2-CA-50029

NEGOTIABILITY CASES

24 FLRA No. 54 (December 17, 1986)

National Treasury Employees Union and Department of the Treasury, Case No. 0-NG-848

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24 FLRA No. 55 (December 17, 1986)

International Association of Machinists and Aerospace Workers, Local Lodge 2424 and Department of the Army, Aberdeen Proving Ground, Aberdeen Proving Ground, Maryland, Case No. 0-NG-1294

24 FLRA No. 57 (December 17, 1986)

American Federation of Government Employees AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. 0-NG-1246

ARBITRATION CASE

24 FLRA No. 58 (December 17, 1986)

Air Force Space Division, Los Angeles Air Force Station, California and American Federation of Government Employees, AFL-CIO (Sabo, Arbitrator), Case No. 0-AR-1027

Federal Labor Relations Authority

24 FLRA No. 53

Dep't of the Army, U.S. Army Medical Department Activity (Noble Army Hospital), Fort McClellan, Ala., Case No. 4-CA-50151 (Decided December 15, 1986)

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(8)
  7114(a)(2)(B)
EXAMINATIONS, INTERVIEWS AND INVESTIGATIONS
  CREDENTIAL COMMITTEE HEARING REGARDING PROFESSIONAL PERFORMANCE
    NOT AN EXAMINATION UNDER 7114 (a)(2)(B)
UNITED STATES CODE
  5 U.S.C. 4301 *ET SEQ.*
  5 U.S.C. 5701 *ET SEQ.* [TRAVEL EXPENSE ACT]

STATUTE

7114(a)(2)(B)
7116(a)(1) and (8)

DIGEST NOTES

A hearing of a credentials committee called to review and make recommendations regarding the professional performance of an ophthalmologist was not an "examination" within the meaning of section 7114(a)(2)(B). Consequently, the agency did not violate section 7116(a)(1) and (8) when it refuse to permit union representation at the hearing. At the hearing the committee examined the report of an auditing ophthalmologist that found that the employee was utilizing out-dated treatments, poor care, and that the majority of cases he reviewed were deficient in evaluation and documentation. The committee recommendations, which the agency subsequently adopted, limited the privileges of the employee regarding certain surgical procedures. The employee had a right to appeal this action. The loss of clinical privileges by a health care practitioners could be the basis for removal under 5 U.S.C. 4301 *et seq.* or 5 U.S.C. 5701 *et seq.* from Federal service.

The hearing was scheduled for the receipt of the auditing physician's testimony and was not dependent in any way on whether or not the employee elected to attend the meeting. Although the employee voluntarily attended the hearing and gave testimony, the hearing was not designed to ask questions, elicit additional information, have the employee admit his alleged wrongdoing, or

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explain his conduct. The scheduled activities would have taken place whether or not the employee attended and participated in the hearing. (majority opinion)

In a dissenting opinion, one Authority Member disagreed with the conclusion that the hearing was not an "examination" under section 7114(a)(2)(B). The hearing was a formal proceeding under agency regulations. Prior to the hearing, the credentials committee reviewed the results of an audit of the employee's health care performance. The employee was advised by the chairman of the credentials committee that he should elect to be at the hearing, that he could have an attorney accompany him and that he could bring other members of the medical staff to testify as witnesses on his behalf. The employee was subsequently served with a formal notification of the hearing and his right to have legal counsel present. The employee reasonable believe that the hearing could result in the restriction, suspension or termination of his clinical privileges which in turn could result in his separation from the civilian service. The credential committee was composed of supervisors and management officials. The purpose of the hearing was to consider the allegations against the employee that resulted from an investigation of his care of patients. (dissenting opinion)

Federal
Labor Relations
Authority

24 FLRA No. 54

NTEU and Dep't of the
Treasury, Case No. 0-NG-848
(Decided December 17, 1986)

SUBJECT MATTER INDEX ENTRIES

- APPOINTMENTS, SELECTION FOR
  - PROMOTIONS
    - LIMITATIONS ON SELECTION
      - DELAY IN FILLING POSITION
- COMPETITIVE AREAS
  - PROMOTION
    - INCLUSION OR EXCLUSION BASED ON BARGAINING UNIT MEMBERSHIP
- FEDERAL PERSONNEL MANUAL
  - CHAPTER 335, SUBCHAPTER 1-4, REQUIREMENT 1
  - CHAPTER 335, SUBCHAPTER 1-4, REQUIREMENT 2
- MANAGEMENT RIGHTS: GENERALLY
  - ACTING AT ALL STANDARD
- PROMOTION
  - PRIORITY CONSIDERATION
    - UNIT MEMBERS TO BE CONSIDERED BEFORE NON-UNIT CANDIDATES
- PROCEDURES, MANDATORY SUBJECTS OF BARGAINING [7106(b)(2)]
  - ACTING AT ALL STANDARD [PROPOSALS THAT PREVENT MANAGEMENT ACTIONS]
    - CIRCUMSTANCES TAKEN INTO ACCOUNT IN APPLYING RULE
  - DELAY
    - PROPOSALS THAT DELAY MANAGEMENT'S EXERCISE OF ITS RIGHTS
- SENATE REPORTS
  - S. REP. NO. 1272, 95TH CONG., 2D SESS. (1978)
- UNITED STATES CODE
  - 5 U.S.C. 2301(b)(1)
  - 5 U.S.C. 2302(b)(6)

STATUTE

7105(a)(2)(E)
7106(a)(2)(C)
7106(b)(2)
7114(c)

DIGEST NOTES

A provision is negotiable that requires the agency to consider eligible bargaining unit candidates for promotion before considering non-unit candidates. The provision provides that the initial area of consideration for promotion will be limited to bargaining unit members, but that such area of consideration can subsequently be expanded. Nothing in the provision requires

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management to make its selection on the basis of anything other than job related criteria. Thus, this provision is not inconsistent with either 5 U.S.C. 2301(b)(1) (re merit system principles) or implementing regulations [FPM Chapter 335, subchapter 1-4, Requirement 1]. The agency remains free to select any candidate, from within or outside of the bargaining unit, for the position. Thus, the provision does not grant "any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment" as prohibited by 5 U.S.C. 2302(b)(6). The provision merely delays management's exercise of its right to select from any appropriate source under section 7106(a)(2)(C). Considering the very limited circumstances under which the delay would have any affect on the exercise of management rights, and that the provision would not prevent management from "acting at all", the provision is a negotiable procedure under section 7106(b)(2). [majority opinion]

In a dissenting opinion, one Authority Member stressed that an agency may determine, for a variety of reasons, that it is necessary to fill a position in fewer than the ten days during which the provision prevents management from considering non-unit candidates. If management made that determination, in accordance with its rights under the Statute, the provision would require the agency to either: (1) select a bargaining unit employee, in violation of its right under section 7106(a)(2)(C) to select from any appropriate source; or (2) wait ten days in order to select a candidate, which would be inconsistent with its determination that its mission accomplishment required the immediate filling of the position. (dissenting opinion)

Federal Labor Relations Authority

24 FLRA No. 55

IAM, Local Lodge 2424 and
Dep't of the Army, Aberdeen
Proving Grounds, Aberdeen,
Md., Case No. 0-NG-1294
(Decided December 17, 1986)

SUBJECT MATTER INDEX ENTRIES

- CODE OF FEDERAL REGULATIONS
  - 5 C.F.R. 610.121(a)(2)
  - 5 C.F.R. 610.121(b)(2)
- HOURS OF WORK
  - ADMINISTRATIVE WORKWEEK [5 C.F.R. 610.121]
    - ADVANCE NOTICE TO UNION OR EMPLOYEES BEFORE RESCHEDULING
      - EXCEPTIONS PERMITTED TO THE STATUTORY MINIMUM [7 DAYS]
        - SERIOUS HANDICAP OF AGENCY OPERATIONS
        - SUBSTANTIAL INCREASE IN COST
      - PROPOSALS THAT ARE TOO RESTRICTIVE
        - EMERGENCIES
        - EXPIRATION OF PRESCRIBED TIME PERIOD
- UNITED STATES CODE
  - 5 U.S.C. 6101(a)(3)(A)

STATUTE

7105(a)(2)(E)
7117(a)(1)

DIGEST NOTES

A proposal is nonnegotiable that would require the agency to give two weeks' notice before establishing or changing employee tours of duty; permit changes in the notice requirement to be made by the commanding officer "when circumstances preclude compliance" or by employee agreement; and prohibit tour of duty changes where the purpose of the change is to avoid or create the need for payment of overtime, night differential, Sunday or holiday pay. Under 5 U.S.C. 6101(a)(3)(A) and 5 C.F.R. 610.121(a)(2), employees must be provided with 7-day notice of changes in their tour of duty except where (1) the agency would be handicapped in carrying out its mission, or (2) costs would be substantially increased. The Authority has previously held that a proposal which restricts the agency's ability to revise work schedules within the 7-day notice period to emergencies was nonnegotiable because it was narrower than the exceptions permitted under the statutory framework. Similarly, the proposal in this case is more restrictive than the exceptions permitted

agencies under applicable law and Government-wide regulation because it requires, in certain circumstances, a two week notice period which must expire before the agency would be permitted to revise employee tours of duty, it.

Federal Labor Relations Authority

24 FLRA No. 56

VA and VA Medical Center, Lyons, N.J. and AFGE, Local 1012, Case No. 2-CA-50029
(Decided December 17, 1986)

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(5)
  POSITION, FILLING OF
CONDITIONS OF EMPLOYMENT 7103(a)(14)
  NON-BARGAINING UNIT EMPLOYEES
    SUPERVISORS
POSITION, FILLING OF
  SUPERVISORY POSITIONS
    NOT A CONDITION OF EMPLOYMENT

STATUTE

7103(a)(14)
7116(a)(1) and (5)
7118

DIGEST NOTES

The agency did not violate sections 7116(a)(1) and (5) by instituting a monthly schedule for rotating certain unit employees (nursing instructors) into the position of Acting Associate Chief of Nursing Service for Education (ACNSE), without first affording the union an opportunity to negotiate concerning the impact and implementation of the change. Although the ACNSE position provides nursing instructors with the opportunity to gain experience in a management position which could benefit their careers, the dispute concerns the filling of a temporary supervisory position. Proposals concerning the filling of supervisory positions, including temporary appointments, are negotiable only at the election of the agency since such proposals do not concern a condition of employment of bargaining unit employees within the meaning of 7103(a)(14).

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Federal Labor Relations Authority

24 FLRA No. 57

AFGE, Local 1931 and Dep't of the Navy, Naval Weapons Station, Concord, Cal., Case No. 0-NG-1246 (Decided December 17, 1986)

SUBJECT MATTER INDEX ENTRIES

- APPROPRIATE ARRANGEMENTS
  - EXCESSIVE INTERFERENCE TEST
- DISCIPLINE EMPLOYEES
  - CONTRACTUAL "STATUTE OF LIMITATIONS"
- EXAMINATIONS, INTERVIEWS AND INVESTIGATIONS
  - TIME LIMITS
    - CONTRACTUAL "STATUTE OF LIMITATIONS"
- MANAGEMENT RIGHTS: GENERALLY
  - ACTING AT ALL STANDARD
  - CONTRACTUAL "STATUTE OF LIMITATION" ON EXERCISE OF MAN. RIGHTS
- NEGOTIABILITY PROCEDURE
  - ALLEGATION OF NONNEGOTIABILITY
    - ABSENCE OF A WRITTEN ALLEGATION ON NONNEGOTIABILITY
      - FAILURE TO RESPOND TO UNION'S REQUEST FOR AN ALLEGATION
        - UNION MAY FILE APPEAL WITHOUT REGARD TO TIME LIMITS
    - UNSOLICITED ALLEGATION OF NONNEGOTIABILITY
      - MADE DURING A FSIP PROCEEDING
      - MAY BE IGNORED BY UNION
- PROCEDURES, MANDATORY SUBJECTS OF BARGAINING [7106(b)(2)]
  - ACTING AT ALL STANDARD

STATUTE

7105(a)(2)(E)
7106(a)(2)(A)
7106(b)(2) and (3)

DIGEST NOTES

A proposal is nonnegotiable which expressly prohibits the agency from taking any disciplinary action against employees for offenses which occurred more than fifteen calendar days earlier or more than fifteen days after the supervisor became aware of the offense, except when circumstances are beyond the employer's control. During the fifteen day period, a disciplinary investigation report must be completed. The proposal would impose a contractual "statute of limitations" beyond which the agency would be precluded from disciplining employees. The proposal would, in certain circumstances, prevent the agency from acting at all with respect to its rights under section

7106(a)(2)(A) to discipline employees. The proposal does not constitute a negotiable procedure within the meaning of section 7106(b)(2). Also, since the proposal completely bars discipline if the 15-day period is exceeded, it is not an appropriate arrangement under section 7106(b)(3).

The union's petition for review of a negotiability issue was timely filed although it was filed more than three months after the agency provided the union with an unsolicited allegation of nonnegotiability during proceedings before the Federal Service Impasses Panel. A union is not required to file a petition for review in response to an unsolicited allegation of nonnegotiability made by an agency in the context of a FSIP proceeding. Rather, the union may ignore such unsolicited allegation and instead elect to request in writing a written allegation of nonnegotiability from the agency, which the union in this case did. However the agency did not respond to the union's request. Where an agency fails to respond to a request for a negotiability allegation the union may file a petition for review with the Authority without regard to the time limits set out in the Authority rules and regulations.

Federal Labor Relations Authority

24 FLRA No. 58

Air Force Space Division, Los Angeles Air Force Station, Cal. and AFGE, Local 2429 (Sabo, Arbitrator), Case No. 0-AR-1027 (Decided December 17, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

7122(a)

- ARBITRATION
  - AUTHORITY OF ARBITRATOR
    - DISCRETION TO FASHION APPROPRIATE REMEDIES
    - FORMULATION OF ISSUES IN THE ABSENCE OF A STIPULATION
    - INTERPRETATION OF A SUBMISSION AGREEMENT
- ARBITRATION AWARDS, REMEDIES ORDERED BY ARBITRATORS
  - FILL POSITIONS IN ACCORDANCE WITH PARTIES' AGREEMENT
- ARBITRATION AWARDS, REVIEW OF, EXCEPTIONS ASSERTED IN APPEAL
  - ARBITRATOR EXCEEDED HIS AUTHORITY [BY:]
    - AFFIRMATIVE ORDER AFFECTING POSITIONS BEYOND GRIEVANCE SCOPE
- ARBITRATION AWARDS, REVIEW OF, NO BASIS FOR REVIEW
  - DISAGREEMENT WITH THE ARBITRATOR'S FORMULATION OF THE ISSUE
  - DISAGREEMENT WITH ARBITRATOR'S FASHIONING OF THE REMEDY
- POSITION, FILLING OF
  - ARBITRATION AWARD
    - COMPLY WITH COLLECTIVE BARGAINING AGREEMENT

DIGEST NOTES

The grievance alleged that the activity violated the parties' collective bargaining agreement when a particular vacancy was filled through an agency program rather than through the local negotiate merit promotion plan. Unable to agree on the issue for arbitration, the parties agreed that the arbitrator would frame the issue. The arbitrator ruled that the terms of the parties' agreement applied to the grievance, and as his remedy, ordered that the agency comply with provisions of the agreement on all future openings.

In its exception, the agency contended that the award was deficient because the arbitrator exceeded his authority by issuing an affirmative remedy applicable to future selection actions rather than the one specific position which formed the basis of the grievance.

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The Authority, like the Federal courts, will accord an arbitrator's interpretation of a submission agreement and an arbitrator's formulation of the issue submitted in absence of a stipulation the same substantial deference accorded an arbitrator's interpretation and application of the collective bargaining agreement. The Federal courts permit an arbitrator to extend the award to issues that necessarily arise from the issues specifically included in a submission agreement or the arbitrator's formulation of the issue submitted in absence of a stipulation by the parties. Both the Authority and the Federal courts have consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies.

The Authority concluded that the award and remedy was not in excess of the arbitrator's authority. Instead, the agency's exceptions essentially disagreed with the arbitrator's formulation of the issues submitted and with the arbitrator's fashioning of a remedy for management's violation of the agreement, which is not a basis for finding an award deficient.

Federal Labor Relations Authority

24 FLRA No. 59

Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Southeast Regional Office, Atlanta, Ga. and NTEU, Case No. 4-CA-1138 (Decided December 17, 1986)

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(1)
  - REPRESENTATION BY UNION OF EMPLOYEE
- EXAMINATIONS AND INVESTIGATIONS
  - CRIMINAL INVESTIGATIONS
  - TELEPHONE SURVEILLANCE
- INTERNAL SECURITY PRACTICES, RESERVED MANAGEMENT RIGHT
  - EXAMINATIONS AND INVESTIGATIONS OF EMPLOYEES
- REPRESENTATION BY UNION OF EMPLOYEE
  - EMPLOYEE'S RIGHT TO UNION REPRESENTATION
    - TELEPHONE SURVEILLANCE

STATUTE

- 7102
- 7106(a)(1)
- 7114(a)(2)(B)
- 7116(a)(1)
- 7118

DIGEST NOTES

The agency did not violate section 7116(a)(1) when it ordered one employee to telephone another employee suspected of compromising an ongoing investigation and to ask that employee certain specified questions without revealing that she was being investigated. Neither employee was provided with union representation.

Although criminal investigations are "examinations" within the meaning of section 7114(a)(2)(B), telephone surveillance of employees is not an "examination". The presence of union representation is utterly incongruous with the surreptitious nature of the agency's surveillance activities. Although management supplied the questions to ask the employee in advance, there was no direct questioning or examination of the employee by agency management; management's involvement was limited to monitoring the conversation; the employee was unaware that the questions and her answers were being monitored; the employee did not feel compelled to answer the questions; management played a passive role the conversation.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Union representation in telephone surveillance of employees would also be inconsistent with management's right to determine its internal security practices under section 7106(a)(1). In fact, it would effectively eliminate the use of surveillance involving questioning of employees as an investigative technique.

Because telephone surveillance is not an examination within the meaning of section 7114(a)(2)(B), the union also had no right to represent the employee who was ordered to asked the questions over the telephone, during the monitoring conversation. Therefore, the agency did not violate 7116(a)(1) for not allowing such representation. However, the Authority encourages agencies that might be in like circumstances in the future to seek other means, whenever possible, to accomplish their internal security and law enforcement functions.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
U.S. ARMY MEDICAL DEPARTMENT ACTIVITY
(NOBLE ARMY HOSPITAL)
FORT McCLELLAN, ALABAMA

Respondent

and Case No. 4-CA-50151

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1941, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This matter is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties who have agreed that no material issue of fact exists. The General Counsel and the Respondent have filed briefs with the Authority.

The complaint alleges that the Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to comply with section 7114(a)(2)(B) of the Statute when it conducted an examination in connection with an investigation in the absence of the employee's requested union representative. For the reasons stated below, we find no merit to this allegation.

II. Facts

In late September 1984, the Commander of the Noble Army Hospital orally advised the unit employee, an ophthalmologist at the hospital, that he should discontinue his treatment of patients pending a review of his medical procedures and proficiency. On October 1, 1984, the Respondent's Credentials Committee met to consider the results of audits conducted by another ophthalmologist of the employee's patient medical records. The purpose of this Committee was to make recommendations to the hospital commander regarding the admission to and retention of staff membership including the assignment, reduction or withdrawal of clinical privileges. The membership of the Committee, with one exception, consisted of supervisors, management officials, and the Chiefs of various departments within the hospital.

The auditing ophthalmologist found that the employee was utilizing out-dated treatments, poor care, and that the majority of cases he reviewed were deficient in evaluation and documentation. Based on this preliminary report, the Committee voted to continue the suspension of the employee's surgical privileges until a hearing could be convened on October 17. On October 3, the employee was notified of the Committee's intention to hold a hearing to review the findings of the auditing physician and that he, the employee, would have an opportunity to respond to the allegations. The employee was informed that he would have the right to be present at the hearing, to present evidence, to cross-examine the ophthalmologist assigned to the Committee, and to call witnesses on his behalf. The employee was also informed that he had the right to consult legal counsel but that this did not include the right to be represented by counsel at the hearing. At the hearing, such counsel could only serve as an advisor and could not question witnesses or present legal argument.

On October 5, the employee wrote the Chairman of the Committee notifying him that he had elected to attend the hearing and desired to defend himself against all allegations. In his letter, the employee notified the Chairman that he would have a legal advisor, that he intended to call witnesses, and that the President of the Local would also attend the hearing on his behalf. By letter dated October 9, the Chairman of the Committee informed the employee that the hearing was not subject to the negotiated agreement and that the presence of a union representative would not be allowed. By letter dated October 11, the employee protested the refusal of the Respondent to permit a union representative to be present, arguing that he was entitled to a union representative under the negotiated agreement and the Civil Service Reform Act.

On October 17, the employee attended the hearing with counsel but without a union representative. During the hearing, he cross-examined the auditing physician (the witness called by the Committee), called witnesses on his behalf, presented evidence, made an opening statement, and testified. After his testimony the employee answered questions posed by the Committee.

By letter dated October 18, the Respondent affirmed its original position that the employee was not entitled to union representation because the Credentials Committee proceedings were not considered, for labor relations purposes, to be formal meetings concerning general conditions of employment. The Respondent further maintained that the Committee makes recommendations to the hospital Commander who makes the decision as to what action to take, and advised the employee that he would have a right to appeal any action that resulted in a loss of credentials. The Respondent asserted that a decredentialing hearing was not a disciplinary action and characterized the Committee as an internal deliberative body responsible only for ensuring the quality of medical care.

The Credentials Committee also issued its findings on October 18. The Committee recommended that the employee's privileges be restricted regarding certain surgical procedures based on its findings that the employee used outdated surgical techniques, kept inadequate documentation, and performed certain medical procedures infrequently. The Committee also concluded that the employee had rebutted certain deficiencies in his outpatient records.

The recommendations of the Committee were adopted by the Respondent on December 12 and the employee was notified of his right to appeal. The employee did not exercise such rights and resigned from his position on January 3, 1985. The parties stipulated that the loss of clinical privileges by a health care practitioner could be the basis for removal under 5 U.S.C. § 4301 et seq. or 5 U.S.C. § 5701 et seq. from Federal service.

III. The Positions of the Parties

The parties do not contest the fact that the employee requested union representation; nor is there an issue concerning whether the employee had a reasonable belief that the hearing could result in discipline. Both facts have been stipulated.

The Respondent argues that the term "examination" in section 7114(a)(2)(B) connotes situations wherein an employee is involuntarily called to explain or answer questions by management. Here, the Respondent argues, the employee was free to attend or not to attend the hearing. If he chose to attend, he was free also to choose whether or not to participate. For example, he need not have testified, nor was he obligated to answer questions. Thus, there was no "examination" within the meaning of section 7114(a)(2)(B) and the employee was not entitled to union representation.

The Respondent also argues that the hearing was not a vehicle for the employee's removal. Removal (in light of any decredentialing), according to the Respondent, would be conducted separately under 5 U.S.C. § 4301 et seq. based on a finding of unacceptable performance, a determination reserved to the hospital Commander. The Respondent argues that the hearing was not an "investigation," but rather a "review by a committee of peers" -- "fellow physicians reviewing the medical practice of another fellow physician."

The General Counsel contends that the hearing met all the requirements of section 7114(a)(2)(B) of the Statute in that the hearing was an "examination" of an employee in connection with an investigation. The General Counsel argues that both private and public sector case law emphasizes the investigatory purpose of the meeting as being determinative of whether the meeting is an "examination" rather than whether the employee's presence was voluntary. Thus, the General Counsel argues, it is totally irrelevant that the unit employee voluntarily appeared at the hearing. In the General Counsel's view, the Respondent violated the Statute when Respondent refused to permit the employee to have union representation and proceeded with the hearing. Such a violation, argues the General Counsel, could not be cured by the subsequent decision of the employee to voluntarily appear at the hearing, without union representation, since the hearing would have taken place regardless of whether the employee appeared or waived the right to appear.

IV. Analysis

There is no question that the Respondent denied the employee union representation at the hearing. Thus, if the hearing met the definition of section 7114(a)(2)(B) of the Statute, that is, involves "any examination of an employee in the unit by a representative of the agency in connection with an investigation" the Respondent would be in violation of the Statute. We conclude that this hearing of the Credentials Committee was not an examination under section 7114(a)(2)(B).

The Credentials Committee was scheduled to review the auditing ophthalmologist's report, review the employee's record, and make recommendations. The hearing was scheduled for the receipt of the auditing physician's testimony and was not dependent in any way on whether or not the employee attended the hearing. Like the situation in *Department of the Treasury, Internal Revenue Service*, 15 FLRA 360, 361 (1984), the hearing was not designed to "ask questions, elicit additional information, have the employee admit his alleged wrongdoing, or explain his conduct." In addition, the scheduled activities were to take place and would have taken place whether or not the employee attended or participated in the hearing. In these circumstances, we find that this hearing was not an examination under the Statute. The fact that the employee was given an option to attend and participate in the hearing and chose to do so does not alter, after the fact, the nature of the hearing. As the hearing was not an examination, we conclude that the Respondent had no obligation under the Statute to grant the employee's request for union representation.*/

V. Conclusion

The Authority has considered all of the facts and circumstances of this case, including the positions of the parties, and concludes, as noted above, that the Respondent has not violated the Statute as alleged in the General Counsel's complaint.

ORDER

The complaint in Case No. 4-CA-50151 is dismissed in its entirety.

Issued, Washington, D.C., December 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ Member McKee's dissenting opinion is set forth below.

Member McKee's Dissenting Opinion

I disagree with the conclusion that the hearing conducted by the Respondent on October 17, 1984, was not an "examination" under section 7114(a)(2)(B) of the Statute.

The hearing was a formal proceeding under Department of the Army Regulation AR 40-66. Prior to the hearing, the Respondent convened the Credentials Committee on October 1 to review the results of an audit of the employee's patient records and health care performance. At that meeting, the Committee considered the findings of the auditing ophthalmologist that the employee was utilizing out-dated treatments, poor care, management and understanding of treatment of patients and that the majority of cases reviewed were deficient in evaluation and documentation. Based on those findings, the Credentials Committee recommended that a Hearing Committee be convened and affirmed the earlier suspension of the employee's surgical privileges.

The parties stipulated that the employee "would credibly state under oath" that he was advised by the Chairman of the Credentials Committee that he should be present at the hearing, that he could have an attorney accompany him and that he could bring other members of the medical staff to testify as witnesses on his behalf (Stipulation 10). The employee was subsequently served with a formal "Notification of Hearing Committee," which informed him that he had an opportunity to be present and that he would have an opportunity to respond to the allegations against him (Stipulation 11). The Notice also informed the employee that he had a right to have legal counsel present to advise him at the hearing. The parties have stipulated that the employee reasonably believed that the hearing could result in the restriction, suspension or termination of his clinical privileges which in turn could result in his separation from the civilian service (Stipulation 19). The employee twice requested in writing that he be allowed to have a representative of his union accompany him to the hearing, and both requests were denied by the Respondent. The employee attended the hearing. In accordance with AR 40-66, he cross-examined witnesses who testified against him, presented evidence and witnesses in his own behalf, testified in his own behalf, and was questioned by members of the Hearing Committee.

As indicated above, the hearing was a very serious formal proceeding. The Hearing Committee was comprised of the following: Respondent's Chief of Professional Services, Chief of Surgery, Chief of Community Health Services, Chief of Internal Medicine and Chief of the General Surgery Service, all of whom were stipulated to as supervisors and/or management officials; and from another Army Hospital, the Chief of Ophthalmology Services. The purpose of the hearing was to consider the allegations against the employee that resulted from an investigation of his care of patients and to examine his record as an ophthalmologist. While the employee was not directly ordered to attend the hearing, his apparently credible and unrefuted claim is that he was told by the Chairman of the Credentials Committee, who was also Chief of Professional Services at the hospital, that he should attend. Moreover, his interests in being present at the hearing were vital. His position and professional reputation were in serious jeopardy. In those circumstances, the employee's attendance at the hearing was not "voluntary." Rather, the oral advice of the Credentials Committee Chairman, as well as the evident professional and economic consequences involved, compelled his attendance and participation in the proceeding to protect himself. The fact that the hearing would have proceeded whether or not the employee attended or participated is not controlling in this case. The employee did attend and participate and he was questioned by members of the Respondent's Hearing Committee.

For those reasons, I find that the October 17 hearing conducted by the Respondent was an "examination of an employee . . . in connection with an investigation . . ." within the meaning of section 7114(a)(2)(B) of the Statute, and that the employee was entitled to have the assistance of his union representative at the hearing as he requested. I conclude that the Respondent violated section 7116(a)(1) and (8), as alleged in the complaint, when it conducted the hearing in the absence of the employee"s requested union representative.

Issued, Washington, D.C. December 15, 1986.

Jean McKee

Jean McKee, Member

24 FLRA No. 54

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

Union

and

Case No. O-NG-848

DEPARTMENT OF THE TREASURY

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of one provision of a negotiated agreement which was disapproved by the Agency head pursuant to section 7114(c) of the Statute. For the reasons set forth below, we find this provision to be negotiable.[1]

II. Procedural Issues

The Agency's statement of position was untimely filed and has not been considered herein. The Agency's request to file an additional submission pursuant to section 2424.8 of the Authority's Rules and Regulations is denied. The Authority granted the request of the Office of Personnel Management to file an *amicus curiae* brief in this case.

III. Union Provision

Article 17, Section 3(b)

> (b) Eligible candidates from within the NTEU, Chapter 201 bargaining unit will be considered for promotion pursuant to the terms of this Article and submitted to the selecting

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[1] Chairman Calhoun's separate opinion begins on page 7.

official for appointment. In the event a bargaining unit candidate is not selected for the position, non-bargaining unit candidates may not be submitted to the selecting official for consideration any sooner than ten calendar days following submission of the Best Qualified list of bargaining unit candidates. This procedure does not apply when filling GS-1 positions.

IV. Positions of the Parties

The Agency disapproved the disputed provision on the grounds that it conflicted with Federal law, namely, 5 U.S.C. §§ 2301(b)(1) and 2302(b)(6).[2]

OPM, in its amicus brief, contends that the disputed provision, by granting priority consideration to bargaining unit employees, gives these employees an advantage in a selection action because of their bargaining unit status, a criterion which is unrelated to the ability, knowledge and skills necessary to perform the duties assigned to a particular position.

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[2] 5 U.S.C. § 2301(b)(1) contains the following "merit system principle":

> (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

5 U.S.C. § 2302(b)(6), "Prohibited personnel practices," provides that any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not:

> (6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment[.]

Thus, OPM concludes, the provision violates section 2301(b)(1) of title 5. Similarly, OPM claims that because the provision imposes a ten-day delay in considering applicants from outside the unit, it denies non-bargaining unit applicants an opportunity for selection and promotion equal to that received by bargaining unit applicants. Hence, OPM argues, the provision would also constitute a prohibited personnel practice under section 2302(b)(6) of title 5.

OPM also argues that the disputed provision conflicts with FPM Chapter 335, subchapter 1-4, Requirement 1, which implements the merit system principle set out in 5 U.S.C. § 2301(b)(1) and requires that identification, qualification, evaluation and selection of candidates for promotion be "based solely on job-related criteria." Rather, according to OPM, the provision mandates that a non-job-related criterion--bargaining unit status--be considered in the job selection process.

The Union argues that the disputed provision neither conflicts with merit system principles nor prevents the Agency from exercising its reserved rights.

V. Analysis and Conclusions

We turn first to the argument that the provision conflicts with 5 U.S.C. § 2301(b)(1), as implemented by the FPM, because the provision mandates that a non-job-related criterion be considered in the job selection process. Contrary to this claim, the disputed provision does not concern the criteria for selection; it concerns the area of consideration that will be used in identifying candidates for selection. In effect, the provision provides that the initial area of consideration for promotion will be bargaining unit members, but that such area of consideration can subsequently be expanded.

OPM's regulations allow agencies wide discretion in selecting the area of consideration. Specifically, FPM Chapter 335, subchapter 1-4, Requirement 2 leaves to agencies the discretion to determine the breadth of the area of consideration necessary to obtain qualified candidates.[3] Nothing in this section of the FPM precludes an agency from determining that a bargaining unit will supply a sufficient quantity of high quality candidates and, thus, is an appropriate area of consideration.

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[3] Requirement 2 provides, in pertinent part, that an "[a]rea of consideration must be sufficiently broad to ensure the availability of high quality candidates, taking into account the nature and level of the positions covered."

Moreover, this provision does not require that the Agency limit the area of consideration to the bargaining unit. It only provides that (1) eligible bargaining unit candidates will be considered for promotion before non-bargaining unit candidates and (2) non-bargaining unit candidates may not be considered until ten days after submission of the "Best Qualified" list of bargaining unit candidates. Nothing in the proposal or the parties' submissions indicates that management would be required to make its selection on the basis of anything other than job-related criteria. Thus, this provision is not inconsistent with either 5 U.S.C. § 2301(b)(1) or with FPM Chapter 335. Additionally, the Authority has consistently held that proposals which require only that consideration be given to employees within a bargaining unit in filling vacant positions, but which do not prevent management from considering other applicants or expanding the area of consideration once bargaining unit employees have been considered, constitute negotiable procedures pursuant to section 7106(b)(2) of the Statute. See, for example, Association of Civilian Technicians, New York State Council and State of New York, Division of Military and Naval Affairs, Albany, New York, 11 FLRA 475 (1983) (Proposal 1); Association of Civilian Technicians, Inc., Pennsylvania State Council and Adjutant General, Department of Military Affairs, Pennsylvania, 4 FLRA 77 (1980).

As for the claim that this provision constitutes a prohibited personnel practice within the meaning of 5 U.S.C. § 2302(b)(6) because it imposes a delay before non-bargaining unit employees may be considered for selection, the proposal does not require the selection of any individual for a position. The Agency remains free to select any candidate, from within or outside of the bargaining unit, for the position. Thus, the provision does not grant "any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment" as prohibited by 5 U.S.C. § 2302(b)(6).

We turn now to the issue whether the provision conflicts with management's right to select under section 7106(a)(2)(C) of the Statute. We conclude that there is no conflict. This provision only provides that (1) eligible bargaining unit candidates will be considered for promotion before non-bargaining unit candidates, and (2) non-bargaining unit candidates may not be considered sooner than ten days after submission of the "Best Qualified" list of bargaining unit candidates. Hence, this provision merely delays management's exercise of its right to select for permanent promotion under section 7106(a)(2)(C) of the Statute. This delay only would occur under the very limited circumstance when (1) there are qualified individuals in the bargaining unit, and (2) management decides not to select one of those employees. Moreover, it would not prevent management from filling a position on a temporary basis in particular circumstances.

From these facts, it is our conclusion that the provision would not impose any substantive limitation on management's exercise of its right. Rather, the provision would establish a procedures for management to follow in exercising its right--albeit one which, under the very narrow circumstances outlined above, would delay management's ability to select for permanent promotion from appropriate sources other than the bargaining unit until ten days had elapsed. It is well established that such a procedure which delays but does not prevent management from acting at all is negotiable under section 7106(b)(2) of the Statute. American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA 153 (1979), enforced sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom., AFGE v. FLRA, 445 U.S. 945 (1982).

We do not apply the "acting at all" standard here as a per se rule. Rather, we apply this standard recognizing the limited circumstances in which the provision would have any effect at all on management's exercise of its reserved rights. As the Authority emphasized in Dix-McGuire, "Congress did not intend subsection (b)(2) to preclude negotiation on a proposal merely because it may impose on management a requirement which would delay implemention of a particular action involving the exercise of a specific management right. Rather, as the Conference Report indicates, subsection (b)(2) is intended to authorize an exclusive representative to negotiate fully on procedures, except to the extent that such negotiations would prevent agency management from acting at all." Dix-McGuire, supra, 2 FLRA at 155, citing the Statute's Conference Report, S. Rep. No. 1272, 95th Cong., 2d Sess. 158 (1978), reprinted in Sub-comm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 826. See also Department of

Defense v. FLRA, *supra*, 659 F.2d at 1153-58, where the Court of Appeals for the D.C. Circuit concluded that "the 'acting at all' standard is a reasonable and natural construction of the statutory language" which "finds support in . . . the legislative history.." *Id.* at 1153-54. We find no support in the record for concluding that the proposal "realistically" would have any more extensive effect on management's operations than that set forth in our analysis of the proposal.

VI. *Order*

The Agency must rescind its disapproval of the disputed provision.

Issued, Washington, D.C. December 17, 1986.

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

Dissenting Opinion of Chairman Calhoun

I agree that the provision does not violate 5 U.S.C. § 2302. Therefore, it would be within the duty to bargain unless it conflicts with management's right to select under section 7106(a)(2)(C) of the Statute. I disagree with my colleagues and find that in certain circumstances the provision directly interferes with management's right to select and is nonnegotiable.

The Agency may determine, for a variety of reasons, that it is necessary to fill a position in fewer than ten days. For example, the Agency may decide that its mission accomplishment requires the immediate filling of a particular position. If management made that determination, in accordance with its rights under the Statute, the provision would require the Agency to either: (1) select a bargaining unit employee, in violation of its right under section 7106(a)(2)(C) to select from any appropriate source; or (2) wait ten days in order to select a candidate, which would be inconsistent with its determination that its mission accomplishment required the immediate filling of the position. In both circumstances, the provision directly interferes with the Agency's right to select under the Statute. Because the provision directly interferes with a substantive right reserved by section 7106(a) to management discretion, it is by definition not a negotiable procedure under section 7106(b)(2). *See*, *for example*, *Local 32, AFGE v. FLRA*, 728 F.2d 1526, 1529 (D.C. Cir. 1984).

My conclusion that management's ability to determine that it may need to make a selection for a position within a certain time is encompassed within the right to select is consistent with the Authority's approach to similar rights under section 7106(a). For example, as the D.C. Circuit held in affirming the decision in *National Treasury Employees Union and Bureau of the Public Debt*, 3 FLRA 768 (1980):

> Without a doubt, the right to determine what work will be done, and by whom and *when it is to be done*, is at the very core of successful management of the employer's business, whether a private sector enterprise or the public sector operations of a federal agency. It follows necessarily that this right is essential to management's ability to function in an effective manner. The Authority's construction of Section 7106(a) as a reservation of

> this invaluable right to management, thereby insulating it from dilution at the bargaining table, is thus fully obedient to the congressional command that the Act be interpreted in a manner consistent with the exigencies of efficient government.

National Treasury Employees Union v. FLRA, 691 F.2d 553, 563 (D.C. Cir. 1982) (footnote omitted; emphasis added). Similarly, management's right to select includes its ability to select an individual immediately if in management's view it needs to be able to do so in order to function in an effective manner.

My colleagues characterize the effect of the provision on management's right to select as delay which does not prevent management from "acting at all" and, as a result of that characterization, find the provision to be negotiable under the *Dix-McGuire* decision. I disagree with that analysis. In my view, such *per se* rules as "acting at all" often muddy rather than clarify the issues. I believe that the Authority has an obligation to examine the real effects of proposals on management rights, and to evaluate whether "substantive management rights have realistically been impaired." *National Federation of Federal Employees, Local 615 v. FLRA*, 801 F.2d 477, 483 (D.C. Cir. 1986). The provision in this case undoubtedly conflicts with the right to select, even if that conflict exists for only ten days. Further, the right to select is not exercised in a vacuum. A selection for a position is made because work needs to be accomplished. The application of the "acting at all" standard in this situation avoids the real issue, in my view, by emphasizing the period of time involved rather than the effect that time may have on the exercise of the right involved.

Issued, Washington, D.C. December 17, 1986.

Jerry D. Calhoun, Chairman

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, LOCAL LODGE 2424

Union

and

Case No. 0-NG-1294

DEPARTMENT OF THE ARMY,
ABERDEEN PROVING GROUND,
ABERDEEN PROVING GROUND,
MARYLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents an issue concerning the negotiability of a single Union proposal. For the reasons set forth below, we find the proposal to be nonnegotiable.

II. Union Proposal

> Tours of duty will be established at least two weeks in advance, will continue for a period of at least two pay periods, and will be announced in writing and once made, will not be changed unless two (2) weeks notice is given. The commanding Officer may make exceptions to this requirement when circumstances preclude compliance or exceptions may be made when agreed to by the employee. Exceptions will not be made, however, where the change in tour is for the purpose of avoiding or creating the necessity for payment of overtime, night differential, Sunday or holiday pay. The announcement of the tour will identify

the calendar days and the hours of each day comprising each tour. Copies of the announcement will be posted in conspicuous places, readily accessible to all affected employees.

III. Positions of the Parties

The Agency contends that the proposal is nonnegotiable under section 7117(a)(1) of the Statute because it conflicts with 5 CFR § 610.121(b)(2), a Government-wide regulation. In support of its position, the Agency cites the Authority's decisions in American Federation of Government Employees, AFL-CIO, Local 2484 and U.S. Army Garrison, Fort Detrick, Maryland, 17 FLRA 769 (1985); and National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986).

The Union contends that the proposal is negotiable because it does not prevent the Agency from making changes in tours of duty and asserts that the proposal is not inconsistent with any law, rule or regulation.

IV. Analysis and Conclusion

The proposal would require the Agency to give two weeks' notice before establishing or changing employee tours of duty; permit changes in the notice requirement to be made by the commanding officer "when circumstances preclude compliance" or by employee agreement; and prohibit tour of duty changes where the purpose of the change is to avoid or create the need for payment of overtime, night differential, Sunday or holiday pay. The issue is whether this limitation would impermissibly restrict the Agency's right, under statutory and regulatory authority, to revise employee work schedules.

In National Association of Government Employees, Local R7-23 and Department of the Air Force, Scott Air Force Base, Illinois, 23 FLRA No. 97 (1986), we held that Proposal 1, which required the agency to give 14 days notice before changing work schedules, except in emergencies, was outside the duty to bargain. Specifically, we found that applicable law, 5 U.S.C. § 6101(a)(3)(A) and 5 C.F.R. § 610.121(a)(2), provides a minimum 7-day notice period except where (1) the agency would be handicapped in carrying out its mission, or (2) costs would be substantially increased. We determined that because Proposal 1 in that case restricted the Agency's ability to revise work schedules within the 7-day notice period to emergencies, it was narrower than the exceptions permitted under the statutory framework, and therefore, inconsistent with law and regulation.

The proposal in this case is to the same effect as the proposal in Scott Air Force Base. While this proposal permits the commanding officer in some situations to make changes in tours of duty without two weeks' notice, it establishes, in certain circumstances, a two-week notice period which must expire before the Agency would be permitted to revise employee tours of duty. As explained by the Union, and as indicated in the record, the restriction is intended to be absolute. Since the proposal does not incorporate the statutory and regulatory exceptions to the notice period, it is inconsistent with law and Government-wide regulation.

For the reasons set forth above and in Scott Air Force Base, we find the proposal to be outside the duty to bargain under section 7117(a)(1) of the Statute.

V. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, the Union's petition for review is dismissed.

Issued, Washington, D.C. December 17, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

24 FLRA No. 56

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION AND
VETERANS ADMINISTRATION MEDICAL
CENTER, LYONS, NEW JERSEY

Respondent

and

Case No. 2-CA-50029

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1012, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the findings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order. *See Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey* 24 FLRA No. 8 (1986).

ORDER

The complaint in Case No. 2-CA-50029 is dismissed.

Issued, Washington, D.C., December 17, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(24 FLRA No. 56)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

VETERANS ADMINISTRATION AND
VETERANS ADMINISTRATION MEDICAL
CENTER, LYONS, NEW JERSEY

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1012, AFL-CIO

Charging Party

Case No. 2-CA-50029

Leslie S. Vincent, Esquire
For the Respondent

Mr. Lee Whitaker
For the Charging Party

Susan M. Roche, Esquire
Edgar Allan Jones, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region II, Federal Labor Relations Authority, New York, New York against the Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey (Respondent), based on an amended charge filed by the American Federation of Government Employees, Local 1012, AFL-CIO (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by instituting a monthly schedule for rotating certain unit employees into the position of Acting Associate Chief of Nursing Service for Education, without first affording the Charging Party an opportunity to negotiate concerning the impact and implementation of the change.

Respondent's answer admitted the jurisdictional allegations of the complaint, but denied any violation of the Statute.

A hearing was held in New York, New York. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record,[1/] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

At all times material herein, the American Federation of Government Employees, AFL-CIO (AFGE), has been, and is now, the exclusive representative for a nationwide unit of certain professional nurse employees of the Respondent, including professional registered nurses at the Veterans Administration Medical Center, Lyons, New Jersey. The professional registered nurses include nursing instructors supervised by the Associate Chief of Nursing Services for Education (ACNSE).

At all times material herein, AFGE has delegated to the National Veterans Administration Council, AFGE (Council) authority to act as its representative for the purposes of collective bargaining for Respondent's employees, including the professional registered nurse employees of the Veterans Administration Medical Center, Lyons, New Jersey, and the Council's delegation has been recognized by the Respondent.

At all times material herein, the Charging Party has acted as the agent of the Council for the purposes of collective bargaining on behalf of the professional registered nurses at the Veterans Administration Medical Center, Lyons, New Jersey, and the Charging Party's delegation has been recognized by the Respondent.

On or about September 21, 1984, the ACNSE implemented a new system whereby all six instructors under the ACNSE would serve in the capacity of Acting ACNSE in the absence of the ACNSE on a rotating monthly basis. The duties and responsibilities of the Acting ACNSE were to include "attending

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[1/] Counsel for the General Counsel's unopposed Motion to Correct the Transcript is granted; the transcript is hereby corrected as set forth therein.

meetings, responding to and assisting faculty from respective schools, writing memos or other correspondence, if necessary, providing guidance and/or assistance to other instructors, if necessary, and checking incoming mail". The Acting ACNSE is expected to perform only these duties and not all of the duties listed in the ACNSE position description.

The Charging Party was not notified and afforded an opportunity to negotiate concerning the impact and implementation of the change.[2]

The ACNSE has been absent ten to twelve times for a total of about three to four weeks since the new schedule was placed in effect. Five of the six nursing instructor have served as Acting ACNSE from one to four days each. There is no change in an instructor's grade, step, or hours of duty when an instructor serves as Acting ACNSE. Nor is there any change in the employee's rating or approving official for purposes of an employee's performance appraisal.

The ACNSE estimates that her absences from the Center in the coming year will include five weeks of annual leave, approximately one week of sick leave, and about two days of administrative leave for seminars. She does not take her vacation at the same time each year. There was no showing that there were some months of the year which would require that an instructor serve as Acting ACNSE more than other months. However, there are no guarantees that each nursing instructor will be able to serve as ACNSE in a fair and equitable manner. Some nursing instructors may be scheduled to be Acting ACNSE during a month when the ACNSE may be away for several days or weeks, and other instructors may be scheduled when the ACNSE is at work every day or absent only for a day or two.

The Acting ACNSE position provides the opportunity for a nursing instructor to gain experience in a management position. In addition, instructors are rated in their annual evaluations on several areas dealing with supervisory and administrative abilities. Service as an Acting ACNSE may be appropriately considered in such areas as well as being mentioned in the narrative description of the employee's performance. Evaluation of these areas may be helpful for promotional opportunities. There are no other supervisory or administrative duties involved in the nursing instructor position, so service as an Acting ACNSE provides the only opportunity for experience and a rating in this area.

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[2] The ACNSE, Patricia Ralston, testified that she notified the instructors of the new rotation at a staff meeting on August 21, 1984 and that, to the best of her recollection, Ben Canete, Union vice-president for the professional registered nurse unit, was present. Canete testified that he had no knowledge of such a meeting. Based on the entire record, I credit Canete's testimony on this point.

The Acting ACNSE is expected to attend any committee meetings which the ACNSE would attend. The instructors regard this as beneficial experience which enables them to learn more about the Medical Center operation and the opportunities for nurses.

Respondent was on notice that the Union desired bargaining on the change at issue. Although the Union never had the opportunity to specifically address its concerns, the Union wished to negotiate a fair and equitable distribution of service as Acting ACNSE among the instructors, the recording of the service as Acting ACNSE in employees' personnel files, and a more specific identification of the duties of the Acting ACNSE. Respondent took the position that the ACNSE is a management position and that the selection of an Acting ACNSE is not subject to negotiation.

The record reflects that from April through November 1983 bargaining unit nursing instructors were rotated through the Acting ACNSE pursuant to an agreement negotiated by the Chief, Nursing Service and the Charging Party. Thereafter, in November 1983, June 1984, and on the instant occasion, September 21, 1984, Respondent made unilateral changes concerning procedures used to fill the position of Acting ACNSE.

Discussion, Conclusions, and Recommendations

In National Labor Relations Board Union, Local 21, 15 FLRA 798 (1984), the union submitted proposals regarding the substitution by unit employees in supervisory positions on a long-term and short-term basis. The period of time covered by such substitution by unit employees ranged from four or fewer working days to eleven or more days. The proposals dealt with such matters as the composition of selection lists, comments concerning supervisory potential, and the performance of bargaining-unit work during such assignments. The Authority declared the disputed proposals to be outside the duty to bargain, stating, in part:

> It is well established that a proposal concerning the filling of supervisory positions, including temporary appointments, is negotiable only at the election of the agency since it does not concern a condition of employment of bargaining unit employees. National Union of Compliance Officers, Ind. and U.S. Department of Labor, Labor-Management Services Administration, 9 FLRA 735 (1982), International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, 3 FLRA 438 (1980) (proposal III) . . . .

Since the Respondent in this case has elected not to bargain, I am, therefore, constrained to conclude that the procedures for filling the ACNSE position, on a temporary basis, does not concern a condition of employment of bargaining unit employees within the meaning of section

7103(a)(14), and that a unilateral change in such procedures does not constitute a violation of section 7116(a)(1) or (5) of the Statute. *National Labor Relations Board Union, Local 21*, *supra*; *Nuclear Regulatory Commission*, 17 FLRA No. 132, 17 FLRA 972 (1985); *United States Department of the Treasury, U.S. Customs Service*, 18 FLRA No. 1, 18 FLRA 1 (1985); *Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island*, 11 FLRA 316 (1983).

In view of this disposition, it is unnecessary to apply the recent criteria set forth in *Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois*, 19 FLRA No. 101, 19 FLRA 827 (1985) for determining whether the impact or reasonably foreseeable impact of a change in unit employees' conditions of employment was more than *de minimis*.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

It is hereby Ordered that the Complaint in Case No. 2-CA-50029 be, and it hereby is, DISMISSED.

GARVIN LEE OLIVER
Administrative Law Judge

Dated: October 9, 1985
Washington, D.C.

24 FLRA No. 57

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 1931

Union

and

Case No. 0-NG-1246

DEPARTMENT OF THE NAVY
NAVAL WEAPONS STATION
CONCORD, CALIFORNIA

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review on this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues concerning the negotiability of the following Union Proposal. We find that this proposal is nonnegotiable.

II. Union Proposal

> Based upon the concept of prompt investigation of the alleged offense, supervisors will initiate the disciplinary action within fifteen calendar days of the alleged offense, or the date he/she becomes aware of the alleged offense. A Disciplinary Investigation Report will be completed prior to formally proposing disciplinary action. Exceptions to the 15-day limit may be made under circumstances that are beyond the Employer's control.

A. Positions of the Parties

The Agency contends that on December 3, 1985, during proceedings before the Federal Service Impasses Panel (FSIP), it notified the FSIP and served the Union with a determination that the above proposal was nonnegotiable. The

Agency argues that since the Union did not file an appeal of the determination with the Authority until March 11, 1986, the appeal is untimely and should be dismissed. The Agency also argues that this proposal precludes the imposition of discipline if the 15-day time frame set out in the proposal is exceeded. Thus, the Agency claims that the proposal violates section 7106(a)(2))A) of the Statute because it prevents the Agency from acting at all with respect to its right to take disciplinary action.

The union claims that it computed the time limits for filing its appeal from January 3, 1986, the date it requested a written allegation from the Agency, not from December 3, 1985, the date the Agency served the Union with an unsolicited allegation during FSIP proceedings. The Union also states that this proposal incorporates into the agreement the well-established concept of timely discipline. This avoids delays which may prejudice an employee's ability to defend himself. Further, the Union asserts that the proposal does not infringe upon management's rights because the clause "exceptions to the 15-day limit may be made under circumstances that are beyond the employer's control" expressly permits reasonable extensions of time. In the alternative, the Union claims that the proposal is either a procedure under section 7106(b)(2) or an appropriate arrangement under section 7106(b)(3).

B. Analysis and Conclusion

As to the procedural issue, it is well established that a union is not required to file a petition for review in response to an allegation of nonnegotiability made by an agency in the context of a FSIP proceeding. Rather, the union may ignore such unsolicited allegation and instead elect to request in writing a written allegation of nonnegotiability from the Agency. See International Brotherhood of Electrical Workers, AFL-CIO, Local 121 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 10 FLRA 198 (1982). If the union elects to request an allegation from the agency, the union must file its petition for review of such allegation within the time limits established in section 2424.3 of the Authority's Rules and Regulations. In this case, during FSIP proceedings, the Agency on December 3, 1985, notified the Panel that certain proposals, including the proposal in dispute, were nonnegotiable and served such allegation to the Union. The Union, as it is permitted to do, ignored this unsolicited December 3, 1985 allegation and instead on January 3, 1986, requested a written allegation of nonnegotiability from the Agency. The Agency did not respond to such request and the Union filed its appeal with the Authority on March 11, 1986. It is also well established that where an agency fails to respond to a request for a negotiability allegation the union may file a petition for review with the Authority without regard to the time limits set out in the Authority's Rules and Regulations. American Federation of Government Employees, AFL-CIO, Local 2494 and Strategic Weapons Facility Pacific, Bremerton, Washington, 7 FLRA 590 (1982); National Treasury Employees Union and NTEU Buffalo District Joint Council and Internal Revenue Service, Buffalo District, 3 FLRA 337 (1980). Thus, since the Agency in this case did not respond to the Union's January 3, 1986, written request for a written allegation of nonnegotiability, the Union's appeal filed on March 11, 1986, is timely.

We turn now to the proposal, which expressly prohibits the Agency from taking any disciplinary action against employees for offenses which occurred more than fifteen calendar days earlier or more than fifteen days after the supervisor became aware of the offense, except when circumstances are beyond the employer's control. In our opinion, this proposal is to the same effect as a provision found nonnegotiable in National Federation of Federal Employees, Local 615 and National Park Service, Sequoia and Kings Canyon National Parks, U.S. Department of Interior, 17 FLRA 318 (1985) (Provision 2), affirmed sub. nom. National Federation of Federal Employees, Local 615 v. FLRA, 801 F.2d 477 (D.C. Cir. 1986). The provision in Sequoia required that investigation of incidents for which disciplinary action may be taken would normally be initiated within 60 days of the incident or within 60 days after the Agency became aware of the incident. The Authority determined that the 60-day time limit constituted a contractual "statute of limitation" beyond which the Agency was precluded from investigating incidents for which employees could be disciplined. Thus, the Authority concluded that the provision would, in certain circumstances, prevent the Agency from acting at all with respect to its right under section 7106(a)(2)(A) to discipline employees. See also American Federation of Government Employees, AFL-CIO, Local 1770 and Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 17 FLRA 752 (1985) (Proposal 3). The proposal in this case, likewise, would establish a contractual limitation which would prevent the Agency from disciplining employees in certain circumstances when the 15-day period was exceeded. Thus, this proposal substantively interferes with management right's and does not constitute a negotiable procedure within the meaning of section 7106(b)(2) of the Statute. *See American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 FLRA 604 (1980), *enforced as to other matters sub nom. Department of Defense v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 945 (1982).

Likewise, the proposal is not an appropriate arrangement under section 7106(b)(3). The proposal would completely bar discipline if the 15-day period was exceeded. Such total abrogation of management's right to act in this regard excessively interferes with management's right to discipline and, therefore, is not an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute. *See American Federation of Government Employees, Local 1799 and Department of the Army, Aberdeen Proving Ground, Maryland*, 22 FLRA No. 62, slip op. at 6 (1986).

For the reasons given here and in the cases cited in the analysis, the Union's Proposal is outside the duty to bargain.

III. Order

The Union's petition is dismissed.

Issued, Washington, D.C., December 17, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

24 FLRA No. 58

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY

AIR FORCE SPACE DIVISION,
LOS ANGELES AIR FORCE STATION,
CALIFORNIA

Activity

and

Case No. O-AR-1027

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2429

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator E. Lad Sabo filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance alleged that the Activity violated the merit promotion provisions of the parties' collective bargaining agreement and the local negotiated merit promotion plan when a particular vacancy was filled through the Air Force-wide Comptroller Civilian Career Management Program (CCCMP) rather than through local promotion procedures. The parties agreed that the Arbitrator would frame the issue and each party submitted its version of the issue for consideration.

The Activity's version was as follows:

> Whether Grievant, an Employee represented by AFGE, Local 2429, was properly considered for the position of GS-560-12, Budget Analyst in ACBI, a position designated a headquarters Air Force career program position, under Merit Promotion Cert. OCPO-C-84-239?

If not, what should the remedy be?

The Union's version of the issue was:

> 1. Whether the Collective Bargaining Agreement and the negotiated Space Division Merit Promotion Plan, dated 5 January 1983, contain any provisions for excluding bargaining unit positions which management has identified for the Comptroller Civilian Career Management Program (CCCMP) or any other career program?
>
> 2. Whether Management violated the Collective Bargaining Agreement and the negotiated space Division Merit Promotion Plan, dated 5 January 1983, in the filling of the GS-560-13 Budget Analyst position, which is a bargaining unit position.

After considering these statements, the Arbitrator framed the issue based on the nature of the grievance as follows:

> Did the Employer violate the Collective Bargaining Agreement and the Space Division Merit Promotion Plan in the filling of a Bargaining Unit Position, Budget Analyst, GS-560-13, SD/ACBI, Los Angeles AF Station, CA PEP #560-13-N-BGT-A?

In elaborating on the nature of the grievance and the issue to be decided, the Arbitrator expressly noted the responses of the Activity in denying the grievance at the initial steps of the grievance procedure. In particular, he quoted a portion of the Activity's step 1 answer which essentially maintained that GS-560-13 budget analyst positions are CCCMP positions which are governed by agency regulation and that therefore such positions are excluded from coverage under the local merit promotion procedures. The Arbitrator further quoted the Activity's Step 3 answer which similarly maintained that the Activity's local merit promotion procedures do not apply to CCCMP positions.

After evaluating the evidence presented, the Arbitrator determined that management's position on the coverage of the merit promotion provisions of the parties' agreement was not supported. Based on the requested finding of the Union, the Arbitrator consequently ruled that the Activity violated the terms of the parties' collective bargaining agreement and rendered the following award:

> The Employer violated the Collective Bargaining Agreement and the Space Division Merit Promotion Plan in the filling of a Bargaining Unit Position, Budget Analyst, GS-560-13, SD/ACBI, Los Angeles AF Station, CA PEP #560-13-N-BGT-A.
>
> Remedy: The Employer is ordered to comply with the terms of the Labor Agreement on any and all future openings pursuant to the locally negotiated Labor Agreement.

III. EXCEPTION

In its exception, the Agency contends that the award is deficient because the Arbitrator exceeded his authority by issuing an affirmative remedy applicable to selection actions other than the specific action which formed the basis of the grievance. In support of this exception, the Agency cites the Authority's decision in U.S. Department of Justice, Federal Prison System, Federal Correctional Facility, Fort Worth, Texas and American Federation of Government Employees, Local 1298, AFL-CIO, 17 FLRA 278 (1985), and maintains that like the arbitrator in that case, the Arbitrator in this case exceeded his authority by addressing "any and all future openings" when his authority was confined to the specific selection action in dispute. The Agency also cites the decision in American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council and U.S. Immigration and Naturalization Service, 15 FLRA 355 (1984), and maintains that the Arbitrator in this case exceeded his authority by extending the remedy beyond that necessary to make the grievant whole.

IV. ANALYSIS AND CONCLUSIONS

We conclude that the Arbitrator did not exceed his authority.

The Authority has specifically held that an arbitrator's award will be found deficient as in excess of the arbitrator's authority when the arbitrator resolves an issue not submitted to arbitration. See Federal Correctional Facility, Fort Worth, Texas, 17 FLRA at 279. But the Authority, like the Federal courts, will accord an arbitrator's interpretation of a submission agreement and an arbitrator's formulation of the issue submitted in the absence of a stipulation the same substantial deference accorded an arbitrator's interpretation and application of the collective bargaining agreement. For example, Mobil Oil

Corp. v. Independent Oil Workers Union, 679 F.2d 299 (3d Cir. 1982). In particular, the Federal courts permit an arbitrator to extend the award to issues that necessarily arise from the issues specifically included in a submission agreement or the arbitrator's formulation of the issues submitted in absence of a stipulation by the parties. See Kansas City Luggage and Novelty Workers Union Local No. 66 v. Neevel Luggage Mfg. Co., 325 F.2d 992, 994 (8th Cir. 1964). Both the Authority and the Federal courts have consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies. For example, U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Lexington, Kentucky and American Federation of Government Employees, Local 817, 21 FLRA No. 108 (1986); IAM District 776 v. Texas Steel Co., 639 F.2d 279 (5th Cir. 1981).

In this case, we conclude that the award and remedy of the Arbitrator is not in excess of his authority. Instead, the Agency's exception essentially disagrees with the Arbitrator's formulation of the issues submitted and with the Arbitrator's fashioning of a remedy for management's violation of the agreement. In view of the substantial deference accorded arbitrators, the exception provides no basis for finding the award deficient. In concluding that the Agency is merely disagreeing with the Arbitrator's formulation, we note the Arbitrator's refusal to adopt the Activity's formulation of the issue, which would have expressly limited the matter to the grievant and the specific selection action, and further note the extent of this matter as considered and litigated by the parties. The parties themselves, as evidenced by the Union's statement of the issue and requested remedy and the Activity's step 1 and 3 answers, have indicated that this matter extended to whether the promotion procedures of the parties' collective bargaining agreement and negotiated merit promotion plan covered selections for career program vacancies. Thus, we conclude that the Arbitrator appropriately viewed the dispute before him as encompassing the question as to whether career program vacancies were excluded from coverage of the parties' agreement and negotiated merit promotion plan.

In contrast to National INS Council, on which the Agency relies, the Arbitrator in this case has not improperly transformed the proceeding into a "sort of class action." 15 FLRA at 356. To the contrary, when a matter in dispute concerns a management practice and policy generally applicable to the entire bargaining unit, federal courts have specifically viewed the arbitrator's authority to be quite broad and have upheld relief from the disputed employment practice or policy which encompasses similarly situated employees. See IAM District 776 v. Texas Steel Co., 639 F.2d 279 (5th Cir. 1981); Shahmoon Industries v. United Steelworkers of America, 263 F.Supp. 10 (D.N.J. 1966). Likewise, in contrast to Federal Correctional Facility, Fort Worth, 17 FLRA 278 (1985) on which the Agency also relies, where the issue necessarily was one of just cause for the discipline of an individual employee, careful review of the pertinent aspects of the record in this case does not evidence a limitation on the authority of the Arbitrator to consider the filling of only the budget analyst position which precipitated the grievance. In short, we find that the Arbitrator was within the scope of his authority in resolving the aspect of the parties' dispute of whether career program vacancies were excluded from the requirements of the negotiated agreements as the Activity asserted. Accordingly, we conclude, contrary to the Agency's contentions, that the Arbitrator did not exceed his authority by deciding that the Activity had violated the parties' agreements. Nor did he exceed his authority by then fashioning an award, consistent with the remedy requested by the Union, which directs the Activity to comply with the terms of its agreements, as interpreted by the Arbitrator.

V. DECISION

For these reasons, the Agency's exception is denied.

Issued, Washington, D.C. December 17, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
SOUTHEAST REGIONAL OFFICE
ATLANTA, GEORGIA

Respondent

and

Case No. 4-CA-1138

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent, the Charging Party (the Union), and the General Counsel to the attached Decision of the Administrative Law Judge. The issue is whether the Respondent violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) by (1) conducting an "examination" of an employee in conflict with the employee's right to request union representation under section 7114(a)(2)(B) of the Statute; and (2) requiring another employee to participate in the "examination." The Authority finds that the Respondent did not commit an unfair labor practice as alleged.

II. Background and Judge's Decision

A special agent in the Repondent's Office of Internal Affairs received a report that an employee, Ms. Franken, may have compromised an ongoing investigation concerning a firearms dealer by telling the dealer's wife about the investigation. As part of the investigation into the allegation, the special agent contacted another employee, Ms. Then, who was a coworker of Franken and who had reported overhearing the telephone conversation during which Franken allegedly compromised the investigation.

Then was interviewed by the special agent about the allegation. Then was also asked to call Franken so that the special agent could monitor and tape record her answers to questions related to the internal investigation. Then asked what would happen if she refused to make the call and she was told that she would have to explain her refusal to her supervisor and that the matter could ultimately reach the Director. Fearing that refusal could adversely affect her, Then agreed to make the call.

The special agent supplied the questions for Then to ask Franken during the conversation. Franken denied compromising the investigation concerning the firearms dealer. When Franken accused Then of asking the questions for someone else, Then denied the accusation.

The Office of Internal Affairs reported the findings of the investigation to the Assistant U.S. Attorney, who concluded that there was insufficient evidence to warrant prosecution. The Assistant U.S. Attorney recommended that the Respondent proceed with the matter administratively. After further internal investigation, which is not in dispute here, Franken was cleared of any wrongdoing. Franken was, however, cautioned in writing about discussing investigative matters with persons outside the Agency. The investigative materials remain on file with the Respondent.

The Judge concluded that the telephone conversation between Then and Franken constituted an "examination" and that Franken's right to request Union representation under section 7114(a)(2)(B) of the Statute had been violated. The Judge found, therefore, that the Respondent had violated section 7116(a)(1) as alleged. The Judge also found that the Respondent violated section 7116(a)(1) when it required Then to participate in the telephone conversation because its actions interfered with Then's right under section 7102 to assist the Union, which had a right to be represented at the examination of Franken. The Judge recommended an Order requiring the Respondent to cease and desist engaging in the unfair labor practices and to post a notice in Respondent's District Office in Jacksonville, Florida, to that effect. The Judge denied the General Counsel's request for "expungement" of the investigative file. The Judge also found no reason to restore the status quo ante because the incident had caused no harm to Franken's career.

III. Positions of the Parties

The Respondent argues that the Judge erred in concluding that section 7114(a)(2)(B) applies in a criminal investigation, and that even if that section applies in such an investigation, no violation occurred in this case because of the surreptitious nature of the investigation. The Respondent also excepts to the Judge's finding that it interfered with Then's right under section 7102 to assist the Union.

The Union and the General Counsel filed exceptions also. They argue that the Respondent should be required to post the notice of the unfair labor practice nationwide rather than in the Jacksonville District Office only, and that, in addition, the investigative file should be expunged.

IV. Analysis and Discussion

A. Criminal Investigations

In Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury, Internal Revenue Service, Southeast Regional Office of Inspection, 23 FLRA No. 108 (1986), we held that section 7114(a)(2)(B) applies to requests by an employee for union representation at an examination by an agency representative in connection with a criminal investigation. For the reasons stated in Internal Revenue Service, Jacksonville District, we reach the same conclusion here.

B. Whether the Conversation Was an "Examination"

Internal Revenue Service, Jacksonville District involved the agency's monitoring and taping of a telephone conversation between a taxpayer and an agency employee concerning possible wrongdoing on the part of the employee. In view of the Congressional intent concerning section 7114(a)(2)(B), we stated that "the presence of a union representative is utterly incongruous with the surreptitious nature of the agency's surveillance activities." Slip op. at 4. We found in that case that: (1) there was no direct questioning or examination of the employee by agency management, (2) management's involvement was limited to monitoring the conversation, (3) the employee was unaware that the questions and his answers were monitored, (4) the employee did not feel compelled to answer the questions, and (5) management played a "passive role" in the conversation. We concluded that the monitoring of the conversation did not constitute an "examination" within the meaning of section 7114(a)(2)(B).

As in Internal Revenue Service, Jacksonville District, we conclude here that a finding of a violation would necessitate an expansion of employee rights that is inconsistent with section 7114(a)(2)(B) and with the Agency's right under section 7106(a)(1) to determine the internal security practices which it will use to investigate alleged wrongdoing by its employees. In fact, it would effectively eliminate the use of surveillance involving questioning of employees as an investigative technique. We do not believe that such a result would be inconsistent with Congressional intent.

Although the Agency supplied the questions for Then to ask Franken during the conversation, its involvement in the conversation itself was limited to monitoring. Also, Franken was unaware that the conversation was monitored and did not feel compelled to answer the questions. In essence, the only differences between this case and Internal Revenue Service, Jacksonville District are that (1) the Agency here actually supplied the questions to be asked during the conversation and (2) the questions were asked by an employee rather than by a member of the public. These are insufficient bases upon which to distinguish the two cases. Consistent with Internal Revenue Service, Jacksonville District, therefore, we conclude that the surreptitious monitoring of the conversation between Franken and Then was not an examination within the meaning of section 7114(a)(2)(B).

C. Interference with Section 7102 Rights

As discussed above, the Union had no right under the Statute to be represented during the monitored conversation. Accordingly, Then's right under section 7102 to assist the Union was not violated.

The Agency placed Ms. Then in a very awkward situation in order to obtain her cooperation in the investigation of Ms. Franken. Although the Agency's actions did not violate the Statute, we encourage the Agency and others in like circumstances to seek other means, whenever possible, to accomplish their internal security and law enforcement functions in the future. It is our view that actions which foster employee management relations based on trust and cooperation are preferred for the most effective and efficient conduct of the Agency's business.

V. Conclusion

Pursuant to section 2423.29 of the Authority's regulations, we have reviewed the rulings of the Judge made at the hearing, find that no prejudicial error was committed, and affirm those rulings. We have considered the Judge's decision, the exceptions to that Decision, and the entire record. We adopt the Judge's findings and conclusions only to the extent that they are consistent with this decision.

We conclude that in the circumstances of this case Respondent did not interfere with, restrain, or coerce employees Franken or Then in the exercise of their rights under section 7114(a)(2)(B) of the Statute. We will, therefore, dismiss the complaint. In view of our conclusion, we do not pass upon the merits of the Judge's recommended remedial order.

ORDER

The complaint in Case No. 4-CA-1138 is dismissed in its entirety.

Issued, Washington, D.C., December 17, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,
SOUTHEAST REGIONAL OFFICE,
ATLANTA, GEORGIA

Respondent

and

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

Case No. 4-CA-1138

Michael Sitcov, Esq.
For the Respondent

Steven P. Flig, Esq.
For the Charging Party

Linda J. Norwood, Esq.
For the General Counsel

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This proceeding arises under the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.) and the Final Rules and Regulations issued thereunder (5 C.F.R. § 2423.14 et seq.). It is based on a complaint issued by the Regional Director of Region IV, Federal Labor Relations Authority, alleging that Respondent violated Section 7116(a)(1) of the Statute by conducting a covert telephone examination of an employee which precluded her from exercising her Section 7114(a)(2)(B) right to request the presence of a union representative. The complaint alleges further that Respondent violated Section 7116(a)(1) by requiring another employee to participate in the covert examination, in which she questioned her colleague in what is termed a consensually monitored telephone call, i.e., one in which a party has consented to government eavesdropping.

A formal hearing was held in Jacksonville, Florida on March 15, 1983. All parties were afforded full opportunity to examine witnesses, to introduce evidence and file briefs. On the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The National Treasury Employees Union (the Union) is the exclusive bargaining representative for a unit which includes Respondent's professional, general schedule, and wage grade employees located in its Southeast Region.

The Respondent, the Bureau of Alcohol, Tobacco and Firearms (ATF), is the branch of the Department of the Treasury responsible for the enforcement of Federal Statutes regulating the alcohol, tobacco and firearms industries. The Office of Regulatory Enforcement at ATF investigates and inspects members of the industry for compliance with federal regulation. The Office of Criminal Enforcement tries to prevent illegal traffic in alcohol, firearms and tobacco. The Bureau maintains its internal integrity by means of the Office of Internal Affairs, an "in-house" branch which is charged with investigating misconduct and criminal violations by ATF employees. Bargaining unit employees Colleen Then and Sania Franken worked in the Jacksonville, Florida, Regulatory Enforcement Division of ATF in March and April of 1981.

Christopher Columbus Hilton, a firearms dealer, had been under investigation for several years by Criminal Enforcement when, on April 8, 1981, Special Agent for Internal Affairs Gary Mugridge received a report that Sania Franken told Hilton's wife that he was under investigation. If the allegation was true, Franken was guilty of the crime of compromising an ongoing investigation.

On April 9, 1981, Agent Mugridge traveled from Atlanta to Jacksonville where he interviewed Ron Mitchell, Special Agent assigned to the Criminal Enforcement office in Jacksonville, and Robert Griffith, the Resident Agent in charge of ATF's Criminal Enforcement office in Jacksonville. In the interview with Mitchell, Mugridge learned that on March 18, 1981, Colleen Then, a friend and co-worker of Franken's, had reported to Mitchell that she had overheard a telephone conversation between Franken and a friend in which Franken had discussed the criminal investigation of Hilton's firearms activities.[1] Mitchell had reported this allegation to Resident Agent Griffith who, in turn, had reported it to his supervisor. Griffith's supervisor reported the allegation to the Office of Internal Affairs.

In the afternoon of April 9th, Mugridge called Then at home and tried to arrange to interview her that night. She refused due to health problems, but agreed to meet with him the next day. On April 10, Then met with Griffith and Mugridge in Griffith's office. She was told the purpose of the interview was to discuss the allegation that an ongoing investigation had been compromised and that she, although not the subject of the investigation, was a witness and had to answer job-related questions under oath, as required by the ATF Manual 8600. Mugridge took a dry run through the questions he intended to ask Then about Franken's alleged compromise of the investigation. He then questioned her under oath with the tape recorder on.

Mugridge next asked Then to call Franken so that he could monitor and tape record her answers to questions related to the internal investigation. Then balked at the request and asked what would happen if she refused to make the call. She was told that she would have to explain her refusal to her supervisor and that this could ultimately reach the Director. She was given 10 to 15 minutes to think over the request. Fearing that her refusal to cooperate could cost her her job, Then agreed to make the phone call.

Mugridge wrote out questions for Then to ask Franken. She was told to keep constant eye contact with Mugridge during the taping of the conversation. She reached Franken by phone on the job at the Castleton Beverage Corporation. The conversation began with a friendly exchange about what was going on at work. Eventually, Then asked Franken about a recent phone call she had overheard while at Franken's house. Franken revealed that it had been Ruth Monger who had called her. (Monger was in Franken's LaMaze class and was married to a gun dealer.) Franken told Then that Monger had mentioned that Christopher Hilton had been arrested by local authorities in a precious metal scheme. While Franken admitted saying to Monger that if Hilton knew the metal was stolen, he deserved whatever trouble he got, she denied discussing the matter any further with Monger. Franken expressed dismay at the questions Then was posing, and accused her of asking them for someone else. Then assured Franken that no one was telling her to ask the questions, explaining that she was wondering about them because Criminal Enforcement personnel had questioned her about the regulatory investigations of Hilton.

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[1] It is not clear whether Then alleged Franken had spoken to Hilton's wife or to someone else. Nevertheless, it is clear that Mitchell and Trestik, a Regulatory Inspector, believed Franken had spoken to Hilton's wife.

Internal Affairs viewed the investigation as a criminal one up to this point, but the information derived from the phone call would have been used in connection with any disciplinary action against Franken. When Internal Affairs reported the findings of the investigation, the Assistant U.S. Attorney concluded that there was insufficient evidence to warrant prosecution and recommended that ATF proceed with the matter administratively.

More than a week later, Mugridge called Franken from Atlanta to arrange for an interview in Jacksonville to discuss the allegations made against her. The interview was scheduled for April 20, 1981. Franken tried to arrange to have a union representative accompany her. However, the representative could not attend, and she agreed to the interview without him. Mugridge informed Franken of the nature of the interview, placed her under oath and recorded her responses. He asked questions similar to those Then had asked during the phone call on April 10. Franken's answers corresponded with those she had given during the surreptitiously monitored phone conversation and corroborated her previous statements that she had not disclosed to Monger or to anyone else anything pertaining to the investigation of Christopher Hilton.

Franken was ultimately cleared of any wrong-doing. On September 18, 1981, Dee Flynn, her third level supervisor, wrote a letter to Franken informing her that the integrity investigation was complete. But, while "clearing" her, Flynn cautioned Franken against discussing ATF matters with persons outside of the agency. The investigative materials remain on file with Respondent.

Discussion and Conclusions

Section 7114(a)(2)(B) grants unit employees the right to union representation during investigative interviews where they have reasonable cause to fear discipline and request such representation.[2] This case presents the following questions with respect to the application of that Section:

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[2] § 7114(a)(2)(B) provides that:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

(1) Does it apply at all to criminal investigations?

(2) Does it apply to investigations into matters affecting an agency's internal security, as opposed to mere misconduct?

(3) Does it apply where the employee fails to request representation because the surreptitious nature of the inquiry concealed the fact that an agency investigation was in progress? (Put another way, may the otherwise legal investigative technique of the consensually monitored telephone call be lawfully used where the subject employee is in a collective bargaining unit?)

In addition, the question is posed whether it is violative of § 7116(a)(1) to require an employee to engage in a management-monitored interrogation of a fellow employee, disguised as a personal conversation, so as to deprive the latter of her § 7114(a)(2)(B) rights?

Respondent contends that § 7114(a)(2)(B) protections should not apply to criminal investigations. Noting the lack of any reference to the matter in the legislative history, it argues that Congress' silence on the matter indicates that it did not intend to interfere with effective criminal law enforcement, and certainly did not intend to delegitimitize certain investigative techniques solely for employees who happen to be represented by unions.

The short answer to this is that the FLRA has already ruled that § 7114(a)(2)(B) applies to criminal investigations which may result in administrative disciplinary action. In Lackland Air Force Base Exchange, Lackland Air Force Base, Texas and American Federation of Government Employees, Local 2911, AFL-CIO, (5 FLRA 473), the Authority held that when an agent of an employer participates in the investigation of a bargaining unit employee accused of a crime, he cannot deny the employee union representation if it is requested. 5 FLRA 473, 485 (1981). In that case, not only did the employer's agents question one employee accused of cash register manipulation, but they also remained present while independent investigative agents interrogated the employee and used the work product of the criminal investigation for their own administrative purposes. While the Authority did not explicitly address whether or not § 7114(a)(2)(B) protections apply to criminal investigations, the ruling makes it clear that employees subject to administrative action based on evidence acquired in criminal investigations are entitled to union representation if they request it.[3]

A convincing rationale for such a holding has, in my view, been elaborately articulated by the National Labor Relations Board. In U.S. Postal Service and Eddie J. Jenkins, 241 NLRB 141, it considered whether the Weingarten rights of employees should be recognized in a criminal investigation.[4] The Board there rejected the contention that an employee's waiver of his Miranda[5] right to counsel in a criminal investigation constituted a waiver of the Weingarten right to union representation in context where the investigation led to discipline. In doing so the Board noted the significant differences in foundation and scope of the two rights, and concluded that the employee's Weingarten rights were "unaffected by any rights he may also have possessed or been accorded under Miranda." Among the differences it observed were that, while an attorney's Miranda role calls for whole-hearted advocacy of his client, whose interests may not be subordinated to the general interests of bargaining unit employees, the Union representative's Weingarten role is far less adversarial and involves the rights of the union as well as the employee. Thus, while the representative's function is to assist the employee who may be "too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors,"[6] unlike a lawyer he may not thwart the investigation, and he may properly elicit facts favorable to the employer. Moreover, he may subordinate the interests of the individual to those of the group, for example by using information gathered in the interview to discourage a nonmeritorious grievance. In terms of effectiveness, the Board noted that while an attorney would be skilled in criminal law, the union representative should be more conversant with contract and other employment rights and relevant grievance or arbitration decisions - in short with the law of the shop. As I read it, the Board essentially concluded that the right to counsel in a criminal investigation is not the equivalent of, and therefore cannot be a substitute for, the right to union representation.

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[3] Cf. U.S. Immigration and Naturalization Service, San Diego, California, OALJ-82-123, where Judge William Naimark held that no § 7114(a)(2)(B) right attaches in an examination where the employee has received a grant of immunity from discipline and therefore cannot reasonably fear it.

[4] In Weingarten v. NLRB, 420 U.S. 251, which involved theft, the Supreme Court sustained the NLRB's holding that employees have the right to union representation during investigatory interviews which they reasonably believe will result in discipline. The doctrine was legislated for federal employees in § 7114(a)(2)(B). While that legislative history indicates that future private sector decisions interpreting Weingarten were not to be "determinative for the Federal Sector" (H.R. Rep. No. 95-1717, 95th Cong. 2d Sess. 155-156), the Board's application of the doctrine (and review thereof by U.S. Courts of Appeals) is a ready resource which ought not be ignored. Such decisions provide a reasoned discourse, in a closely analogous area, where highly similar if not identical considerations of public policy are involved. See Library of Congress v. FLRA, 112 LRRM 2897, 2901 (CADC).

[5] Miranda v. State of Arizona, 384 U.S. 436.

[6] Weingarten v. NLRB, 420 U.S. 251, 263

The Board concluded that exclusion of a union representative from a criminal investigation, coupled with the potential for use of the fruits of such investigation in the imposition of discipline, would effectively nullify rights recognized in Weingarten and § 7114(a)(2)(B). I perceive no reason (except in circumstances where union officialdom is implicated in criminal conduct), why the Board's approach is not wholly fitting in the federal sector. Accordingly, I conclude that management's right to so conduct criminal investigations must yield to representation rights set forth in § 7114.

Respondent presses another, very similar argument, but one which presents considerations which are absent in the private sector. It asserts that any holding that § 7114 precludes the use of consensually monitored conversations is an unwarranted inteference with management rights recognized in § 7106. That section provides that ". . . nothing in this chapter shall affect the authority of . . . (management) . . . to determine . . . (its) internal security practices."

As in the case of suspected crimes, I conclude that the right to use this particular investigative technique must yield to the employee/union rights recognized in § 7114. Section 7106 clearly renders the substance and scope of internal security practices nonbargainable.[7] It is, perhaps, arguable that the techniques used in investigating suspected internal security violations are, like the rules themselves, under the umbrella which leaves them unaffected by other provisions "of this chapter." But to do so is to read by implication into § 7106 an intention by Congress to remove such investigative procedures from the reach of another provision of the Act which expressly recognizes the right of employees to union representation at investigatory interviews in which the risk of discipline reasonably inheres.

7/ Mare Island Naval Shipyard, 12 FLRA No. 78.

In the effort to square, or balance, the rights recognized in § 7106 with those recognized in § 7114, as well as this law with criminal laws, it must be acknowledged that this recommended resolution will, on occasion, significantly impair management's right to protect its mission, its property, and its personnel against crimes, and internal security breaches which fall short of crimes. A grant of immunity from discipline, which might in other circumstances justify a refusal to accord union representation, is of course, foreclosed in the case of a consensually monitored conversation.[8/] Where this ruse is deemed vital to a successful investigation, its use would appear to be limited to those cases where other law enforcement or internal security agents (who are not "representatives of the agency" subject to § 7114), are available and authorized to make the investigation. Where the agency is alone charged with such investigative powers, and the criminal and administrative aspects of misconduct are inseparable, the use of the technique would be precluded absent the possibility of some acceptable arrangement for observing a use immunity which is not disclosed to the suspect. To permit an agency to operate without such restrictions would, as the Labor Board noted, effectively nullify rights explicitly set forth in Section 7114. Although I conclude that such rights attach in internal security investigations as well as criminal investigations, I do so in the belief it is by no means certain that Congress intended such a result or that the enforcement of other laws should be subordinated to the apparent commands of this one. Having given the matter some thought, I think it is useful to set forth those reservations.

First, this result appears anomalous in the light of the early legislative history. It was the House which first addressed this question, on which the Senate was silent in its original bill. HR 3793 provided that an employee could not be required to answer questions during an investigation of misconduct which could lead to suspension, removal or reduction in rank or grade unless first advised in writing of the fact of the investigation, the nature of the alleged misconduct, and the right to a representative of his choice. (Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Congress, 1st Sess., Committee on Post Office and Civil Service, Committee Print No. 96-7, p. 230). Should such rights be violated, § 7171(c) provided its own sanction: "(a)ny statement made by or evidence obtained during questioning of an employee . . . may not be used as evidence in the course of any action for suspension, removal or reduction in rank or pay subsequently taken against the employee" (Legislative History, supra, p. 231). In the Committee's Report (Legislative History, supra, pp. 647-648) it was noted that the sanction set forth in § 7171(c):

[8/] The same is, of course, true of any assurance that the answers and their fruits would not be used in any criminal case, under the holding of Kalkines v. U.S., 473 F.2d 1391 (Ct. Cl. 1973).

> is similar to the exclusionary rule in criminal law, although certain differences should be noted. First, the phrase "statement made or evidence obtained during questioning" (emphasis supplied) reflects the Committee's intention that only evidence obtained (1) at the time of the questioning and (2) from the employee, may not be used in a subsequent adverse action. Evidence obtained other than through the questioning of the employee, even if such evidence was uncovered due to a lead developed during the questioning, could be used provided, of course, that it was otherwise competent.

Thus the only reference to criminal law went to the fruits of the questioning, in a way which conflicts with criminal law concepts barring the use of the fruits of the "poisoned tree." And, of course, the very notion of requiring the represented employee to answer questions is inconsistent with the privilege against self-incrimination. In conference all these matters were eliminated. The word "discipline" was substituted for misconduct with certain specific and serious consequences; the references to the requirement that questions be answered and to the inadmissibility of evidence gathered in the absence of representation were dropped; the requirement that the employee be informed of the nature of the investigation and his right to representation was removed; and "investigation" was modified so as to encompass "any examination . . . in connection with an investigation . . ." (Legislative History, supra pp. 823 and 824). There is no hint of Congress's intention with respect to the interface of criminal and administrative investigations.

Thus, the House demonstrated its concern for employee rights during investigations, whereas the Senate did not. But the House proposed to do so in a manner which did not fully recognized the rights of a criminal suspect.[9] After meeting with the Senate, which initially showed no such concerns, a statute was fashioned which literally applies to any examination in connection with an investigation aimed at a unit employee.

Second, it is difficult to see, as noted above, how the discrete interests of criminal law enforcement and the maintenance of administrative discipline and controls can be harmonized. Often the two aspects of misconduct are inseparable. There is of course no problem where the law enforcement or internal security agents are not employed by the agency, but are nevertheless empowered to conduct the investigation. Such agents would not be hobbled by § 7114, which applies to "representatives of the agency." The same may be true of agents employed by a "wholly autonomous" investigative arm of a Department, over which the agency has no control.[10] But where the agency is required to make the investigation, in a bargaining unit, the use of a consensually monitored conversation would appear to be precluded, absent recognition of self-imposed constraints or isolation of the agency's investigative arm. It will serve no useful purpose to speculate further about such matters. Suffice it to say that elimination of an otherwise lawful investigative technique will have a harmful effect on the process of protecting property and preventing corruption in government, and that acknowledgement of such consequences is a necessary ingredient in the effort to determine what Congress intended and how Section 7114 should be interpreted in the light of other Sections of this Statute as well as other laws.

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[9] Note that a federal employee can be discharged for not answering a question if adequately informed that he is subject to discharge for that reason and is granted a "use immunity," i.e., assurance that his replies and their fruits will not be used against him in a criminal case. Kalkines v. U.S., 473 F.2d 391 (Ct. Cl. 1973).

In sum, I find no real guidance in the legislative history, and find confusing in the Statute itself the combination of a free hand for management respecting internal security practices and a clearly stated right to representation in any investigation which may reasonably lead to discipline. I am persuaded by the explicit treatment accorded the latter that it must prevail.

Having addressed the two threshold questions, I now consider whether Respondent violated Franken's rights based on § 7114(a)(2)(B) and § 7116(a)(1) of the Statute. To establish non-compliance with § 7114(a)(2)(B), the General Counsel must show that the examination was investigatory in nature, that the employee reasonably believed he was subject to disciplinary action, and that the employee requested union representation.

As for the first criterion, even though Then, not Mugridge, questioned Franken, I conclude that the conversation between Then and Franken was an "examination . . . in connection with an investigation." The questions Mugridge told Then to ask were designed to elicit information from Franken which could cast light on the allegations made against her. It is irrelevant that these questions were not asked by Mugridge directly. Reluctantly, Then served as an undercover agent or mouthpiece for Mugridge. The information elicited from Franken could have been used against her in a disciplinary action just as surely as if Mugridge had arranged to interview her at the District office.

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[10] See Department of the Treasury, Bureau of the Mint, Administrative Law Judge Decisions Report No. 9. There Judge William Devaney held that Section 7114 did to apply to Secret Service agents investigating the theft of coins at the Mint.

With respect to the second and third criteria, Franken was precluded from forming any beliefs about the possibility of disciplinary action because of the covert nature of the interrogation. Had she known what was underway, she would have certainly confronted the prospect of disciplinary action. But the need for this was concealed. She could not reasonably be expected to assert her rights in the circumstances. For this reason, as well, it cannot be said that she waived her rights. The concealment of the examination constituted a deprivation of Franken's right to seek the Union's assistance. By depriving Franken of her § 7114(a)(2)(B) rights, ATF interfered with her exercise of a "right under this chapter" in violation of § 7116(a)(1).[11]

Finally, the Complaint alleges that Mugridge "ordered, directed and forcefully adjured" Then to interrogate Franken in his behalf, thus intefering with, restraining and coercing her in the exercise of her § 7102 rights in violation of § 7116(a)(1). More particularly, General Counsel argues that Respondent thereby interfered with Then's right to refrain from conduct which violated Franken's § 7114(a)(2)(B) right to request Union representation. Respondent, picking up on the language of Section 7102, contends that its requirement that Then assist it in ascertaining the facts about a possibly compromised criminal investigation did not affect her right to "form, join or assist any labor organization" or to bargain collectively through the Union.

Respondent's argument, of course, misses the General Counsel's point, and appears to be based on the fact that the interrogation did not focus on the Union activities of Franken.[12] No party advances a case in point respecting the proposition that an employee enjoys a protected right to avoid participation in an unfair labor practice. The dearth of such precedent, from a half-century of labor law litigation, for what would appear to be an obvious infringement of rights, gives one pause respecting whether a tenable theory exists, or whether it has been deemed pointless to fashion one because an employee in Then's circumstances would, in any event, be fully protected as an incident to the protection of Franken's rights.[13/]

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[11] Respondent argues that even if Franken's § 7114(a)(2)(B) protections were circumvented during the monitored call, she was given the opportunity to participate at the second interview with the aid of a Union representative. Respondent argues further that since Franken consented to be interviewed alone, this shows that no significant harm occurred (in violation of the Statute) during the monitored phone call. But Respondent's argument misses the point. It was too late for the Union to provide Franken with effective representation. Franken had already disclosed information to Mugridge which could have been used against her in a disciplinary proceeding had it provided grounds for such action. The horse was already out of the barn.

[12] I would agree with Respondent were we here concerned with imposition of a requirement that Then participate in a fact-gathering technique - such as bugging, wire tapping, video or plain old-fashioned surviellance of Franken - designed to determine whether Franken was compromising investigations. Such circumstances would not involve "an examination," in the sense of an interview in which the risk of discipline lies in the mouth of the suspect, and hence would not bring into play the protections afforded by Weingarten.

General Counsel relies on a line of Labor Board cases where that agency has "protected" supervisors who were discharged for refusing to carry out orders to violate the rights of employees.[14/] General Counsel asserts that the Court there held that the company "attempted to force a supervisor to participate in the commission of an unfair labor practice, in violation of Section 8(a)(1)," and argues that if an individual not protected by the Statute cannot legally be forced to commit an illegal act, *a fortiori* a protected employee cannot legally be required to do so.

I regard that line of cases as wholly inapposite. They involve no allegation or finding that the supervisors' rights were infringed. Rather, they involve reinstatement of supervisors who did not obey such orders, as a necessary incident of the Board's power to fashion effective remedies. The rights protected were those of the employees (the Frankens there involved), and truly effective vindication of those rights required that the supervisors' insistence or respecting them be itself respected. Then, as Respondent's agent, would be entitled to the same kind of protection, even if she is viewed as not being engaged in protected activity in such circumstances.

Whatever my doubts concerning the usefulness of creating two discrete violations where the identical remedy would flow from one (not to use employees - or anyone else - to so disguise an investigative interview and thus circumvent § 7114(a)(2)(B) protections), I find that Then's rights were violated. § 7102 gives her the right to assist unions. § 7114(a)(2)(B) grants unions the "opportunity to be represented at . . .

[13/] Labor Board cases exist finding unlawful efforts to enlist employees in surviellance of the union activities of other employees, although it is not made clear beyond doubt that the violation is predicated on an infringement of the rights of the employees who were asked to spy as opposed to those who were to be spied upon. See Elder-Burman Stores Corp., 415 F.2d 1375 (C.A. 6); Sarkes Tarzian, Inc. v. NLRB, 374 F.2d 734, 736 (C.A. 7).

[14/] See, for example, Howard Johnson Co., v. NLRB, 112 LRRM 2904 (C.A. 1).

any examination . . . in connection with an investigation" in circumstances present here, and gives Franken the right to Union representation. Respondent, by requiring Then to participate in conduct which precluded the exercise of such rights and which was thus destructive of them, interfered with Then's § 7102 right to assist the Union. Since the effect of Respondent's conduct was deprivation of such rights, it is irrelevant that such purpose never entered her mind.

Accordingly, I conclude that Respondent, by failing to observe the rights set forth in Section 7114(a)(2)(B) interfered with, restrained and coerced Then in violation of § 7116(a)(1).

The Remedy

The General Counsel requests a nationwide posting on the ground that the employees involved were relocated to Miami, Florida and California, and that the violation "reaches to the very essence of employees' guaranteed rights." While, clearly, neither of these is a recognized reason for nationwide posting, I briefly considered the possibility that such an approach was justified because the offending investigation technique was one authorized by headquarters of the Office of Internal Affairs as a national policy. However, the Authority has limited posting to the location of the unfair labor practice, even where it was committed pursuant to a nationwide policy promulgated by the respondent union's president, noting the absence of any reason to conclude that such policy would be continued after issuance of the Decision finding it unlawful.[15]

General Counsel also requests "expungement of the voluminous file of the investigation of Sania Franken, which was based on Respondent's illegal actions occurring on the second day of Respondent's investigation."[16] If this request is limited to that part of the investigation which was affected by the illegal interview, it would involve only the tapes of the consensually monitored call to Franken, the direct interview of her in which her Weingarten rights were belatedly respected, and pages 10 and 12 of the investigative report, which recaps those interviews. I have no authority to strike from such record the earlier evidence, derived from other agents of the Bureau (all of which originated with Then) which established that Then was present during a telephone call in which Franken might have compromised a criminal investigation. The illegal interrogation elicited Franken's version: that the outsider to whom she spoke asked what she thought of the arrest or convinction by County authorities, of a firearms dealer who allegedly was trading in stolen gold. That was not a federal matter, so that the conversation could have been perfectly innocent. But it was also redolent with the suggestion that Franken and the outsider (who was married to a man in the firearms industry) talked too much about the former's employment. In the presence of such possibility, the Bureau determined that a word of caution was in order. In the circumstances, I conclude that I have the authority to order the letter of caution and the three matters described above removed from Franken's file and destroyed. However, I doubt that the efficacy of such a course, given the fact that the early investigation indicated very serious misconduct, and that the illegal interrogation and what followed it in the main vindicated Franken. Were I to order expunged evidence tending to exculpate her we would be left with a record strongly suggesting that she had compromised an investigation by informing the suspect's wife. The record, as it now stands, indicates that Then misunderstood the half of a conversation she overhead, and that it was concerned with trading in gold, a nonfederal matter. In my judgement, expungement of the exculpatory matters disclosed in the illegal interrogation and its aftermath would not serve a remedial purpose.

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[15] National Treasury Employees Union, et al., 10 FLRA 519, 521. Cf. VA Medical Center, Bath, NY, 12 FLRA 560, where posting was ordered at headquarters and Bath.

[16] There is, of course, no occasion for restoration of the status quo ante in the absence of damage to Franken's career. Arguably, she suffered no discipline, as she was cleared of the "charge," or suspicion, that she had divulged information concerning an active investigation to the wife of the firearms dealer who was the subject of the investigation. The letter from her superior announced that the investigation did not "prove the allegations," and then added that "there was apparent idle conversation concerning ATF which could have been construed as important information concerning a possible investigation. You are cautioned not to be guilty of any conversation to persons outside the Bureau concerning any inspection or investigation which deals with ATF matters." In my judgement this constituted a mild form of discipline, potentially harmful to her career prospects, because it suggests she was guilty of using poor judgement which could have adversely affected the Bureau's law enforcement activities.

Accordingly, I recommend that the following order be entered:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby orders that Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Southeast Regional Office, Atlanta, Georgia, shall:

1. Cease and desist from:

(a) Engaging in investigatory interviews of bargaining unit employees, which may lead to disciplinary action, by means of consensually monitored telephone calls which conceal the fact that an investigation is underway, and thus operate to deprive employees of the right to request and receive representation by the National Treasury Employees Union, their exclusive collective bargaining representative.

(b) Requiring any employee to place a telephone call to a bargaining unit employee, and, in behalf of management to engage in a covert investigatory interview designed to elicit information which could lead to discipline, thus interfering with, restraining and coercing the employee required to make the call in the exercise of the right to assist the National Treasury Employees Union in the exercise of its right, upon request, to be represented at such examination.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities at the Bureau of Alcohol, Tobacco and Firearms, District Office, Jacksonville, Florida, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by authorized representatives, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director for Region IV, in writing, within 30 days from the date of this order, as to what steps have been taken by comply herewith.

JOHN H. FENTON
Chief Administrative Law Judge

Dated: October 21, 1983
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce any bargaining unit employee in the exercise of the Statutory right to be represented by the National Treasury Employees Union during an investigatory interview which may reasonably lead to discipline, by conducting a monitored examination through another employee who is an undisclosed agent of management, thus concealing the nature and purpose of the interrogation and precluding the opportunity for Union representation.

WE WILL NOT interfere with, restrain, or coerce any employee in the exercise of the right to assist the Union in the representation at an investigatory interview of another employee, by requiring that employee to act as an agent of management and by means of a covertly monitored telephone call to elicit from the employee called information which could be used in a disciplinary action against him or her.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employees in the exercise of their rights assured by the Statute.

____
(Agency or Activity)

Dated: __________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice of compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region IV, whose address is: 1776 Peachtree Street, NW., Suite 501, North Wing, Atlanta, Georgia 30309, and whose telephone number is: (404) 881-2324.

*U.S.GOVERNMENT PRINTING OFFICE:1987-181-223:60001

9/case 412

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 412 REPORT OF CASE DECISIONS December 18, 1986

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UNFAIR LABOR PRACTICE CASES

24 FLRA No. 60 (December 18, 1986)

Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, Case No. 4-CA-40452

24 FLRA No. 61 (December 18, 1986)

National Guard Bureau and Association of Civilian Technicians, Case No. 3-CA-60128

24 FLRA No. 62 (December 18, 1986)

Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region and American Federation of Government Employees, Case No. 2-CA-50222

24 FLRA No. 63 (December 18, 1986)

Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, Case No. 2-CA-50188

Y3.F 31/21-3:

24 FLRA No. 60

HHS, SSA and AFGE, Case No.
4-CA-40452 (Decided December
18, 1987)

Federal Labor Relations Authority

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(5)
  INFORMATION
AGENCY ULP (ALLEGED) 7116(a)(8)
  7114(b)(4)
EXECUTIVE ORDERS
  E.O. 11491
    19(a)(6)
    10(e)
INFORMATION, UNION RIGHTS UNDER THE STATUTE
  NECESSITY OR RELEVANCE FOR FULL AND PROPER DISCUSSION
    ALTERNATIVES TO REQUESTED INFORMATION AVAILABLE
      MERE EXISTENCE OF OTHER MEANS NOT SUFFICIENT FOR DENIAL
  TYPES OF INFORMATION SOUGHT
    NAMES AND ADDRESSES OF EMPLOYEES
SENATE REPORTS
  S. REP. NO. 93-1183 (1984)
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  INFORMATION, PROVIDED UNION
UNITED STATES CODE
  5 U.S.C. 552 [FREEDOM OF INFORMATION ACT]
  5 U.S.C. 552(a)(3)
  5 U.S.C. 552(b)(6)
  5 U.S.C. 552(c)
  5 U.S.C. 552a [PRIVACY ACT]
  5 U.S.C. 552a(a)(4)
  5 U.S.C. 552a(a)(7)
  5 U.S.C. 552a(b)(3)
  5 U.S.C. 552a(e)
  5 U.S.C. 552a(m)
  5 U.S.C. 552b [SUNSHINE ACT]

STATUTE

7102
7114(b)(4) and (b)(4)(B)
7116(a)(1), (5) and (8)
7118

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

READEX FICHE best copy available

DIGEST NOTES

The agency violated sections 7116(a)(1), (5) and (8) when it refused to provide the union with the home addresses of bargaining unit employees. The release of the names and addresses of bargaining unit employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). The release of such information is generally required without regard to whether alternative means of communication are available.

**Federal
Labor Relations
Authority**

24 FLRA No. 61

National Guard Bureau and Association of Civilian Technicians, Case No. 3-CA-60128 (Decided December 18, 1986)

SUBJECT MATTER INDEX ENTRIES	**STATUTE**
AGENCY ULP (ALLEGED) 7116(a)(5)	7103(a)(14)
NATIONAL CONSULTATION RIGHTS	7113(b)(1) and (b)(2)
NATIONAL CONSULTATION RIGHTS	7116(a)(1) and (5)
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS	
NOTIFY UNION AND AFFORD UNION REPRESENTATIONAL RIGHTS	
NATIONAL CONSULTATION RIGHTS	

DIGEST NOTES

The agency failed to fulfill its obligation to consult with the union pursuant to section 7113(b)(1) prior to issuing a memorandum expanding its Mix-of-the-Force policy, and thus the agency violated section 7116(a)(1) and (5). Section 7113(b)(1) requires an agency to inform a labor organization having national consultation rights with the agency of any substantive changes in conditions of employment proposed by the agency and to provide the labor organization with reasonable time to present its views and recommendations regarding the changes and to consider such views and recommendations. The new policy listed twelve (12) job classifications which could be filled by active National Guard/Reserve Military personnel. The twelve (12) job classifications were positions which had previously been reserved exclusively for civilian technicians. Such a change constituted a substantial change in conditions of employment of bargaining unit employees.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 62

HHS, SSA, and SSA Field Operations, New York Region and AFGE, Case No. 2-CA-50222
(Decided December 18, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(5)	7114(b)(4)
INFORMATION	7116(a)(1), (5) and (8)
AGENCY ULP (ALLEGED) 7116(a)(8)	7118

AGENCY ULP (ALLEGED) 7116(a)(8)
    7114(b)(4)
INFORMATION, UNION RIGHTS UNDER THE STATUTE
    NECESSITY OR RELEVANCE FOR FULL AND PROPER DISCUSSION
        ALTERNATIVES TO REQUESTED INFORMATION AVAILABLE
            MERE EXISTENCE OF OTHER MEANS NOT SUFFICIENT
    PRIVACY
        PRIVACY ACT [5 U.S.C. 552a]
            EXCEPTION: ROUTINE USE [5 U.S.C. 552a(b)(3)]
    TYPES OF INFORMATION SOUGHT
        NAMES AND ADDRESSES OF EMPLOYEES
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
    INFORMATION, PROVIDE UNION WITH
UNITED STATES CODE
    5 U.S.C. 552a [PRIVACY ACT]

DIGEST NOTES

The agency violated sections 7116(a)(1), (5) and (8) when it refused to provide the union with the home addresses of bargaining unit employees. The release of the names and addresses of bargaining unit employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). The release of such information is generally required without regard to whether alternative means of communication are available.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 63

HHS, SSA and AFGE, Case No. 2-CA-50188 (Decided December 18, 1986)

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(5)
  - INFORMATION
- AGENCY ULP (ALLEGED) 7116(a)(8)
  - 7114(b)(4)
- INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE
  - NECESSITY FOR FULL AND PROPER DISCUSSION
    - ALTERNATIVES TO REQUESTED INFORMATION AVAILABLE
      - MERE EXISTENCE OF OTHER MEANS NOT SUFFICIENT FOR DENIAL
  - TYPES OF INFORMATION SOUGHT
    - NAMES AND ADDRESSES OF EMPLOYEES
- UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  - INFORMATION, PROVIDE UNION WITH
- UNITED STATES CODE
  - 5 U.S.C. 552 [FREEDOM OF INFORMATION ACT]
  - 5 U.S.C. 552a [PRIVACY ACT]

STATUTE

7114(b)(4)
7116(a)(1), (5) and (8)
7118

DIGEST NOTES

The agency violated sections 7116(a)(1), (5) and (8) when it refused to provide the union with the home addresses of bargaining unit employees. The release of the names and addresses of bargaining unit employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). The release of such information is generally required without regard to whether alternative means of communication are available.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Respondent

and Case No. 4-CA-40452

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent (Agency). The issue is whether it is an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Charging Party (Union) with the home addresses of employees of the Respondent's Atlanta Region who are represented by the Union's National Council of SSA Field Assessment Locals (AFGE FAO Council) as part of a national exclusive unit represented by the Union.

In a recent Decision and Order on Remand, Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA No. 101 (1986) (FHAFO), we reviewed the Authority's previous decision concerning the release of the names and home addresses of bargaining unit employees to exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that the release of the information is generally required without regard to whether alternative means of communication are available. Consistent with our decision on remand in FHAFO, we conclude that the Respondent's refusal to provide the Union with the home addresses of bargaining unit employees sought in this case violated section 7116(a)(1), (5) and (8) of the Statute.

II. Facts

The Union is the exclusive representative for many of the Respondent's employees, who are grouped in various nationwide bargaining units. The Union requested the names and addresses of all bargaining unit employees in the Atlanta Region of the Respondent represented by the AFGE FAO Council. The FAO Council acts as an agent for the Union in representing the Respondent's Field Assessment Office (FAO) employees. The Respondent provided the Union with the names and office addresses of the unit employees. The Union then clarified its initial request by specifically requesting the home addresses of the employees. The Respondent denied the request on the basis that: "Providing such information would be an invasion of personal privacy and is withheld under the Privacy Act [5 U.S.C. § 552a] and Exemption 6 (six) of the Freedom of Information Act [5 U.S.C. § 552(b)(6)]."

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent failed to comply with the requirements of section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) when it refused to provide the Union, upon request, with the home addresses of the unit employees which it had sought. In reaching that conclusion, the Judge found that the home addresses of the unit employees were reasonably available; that the information was necessary for the Union to perform its representational obligations; that the alternative means of communication available to the Union were not adequate for effectively communicating with the employees; and that the Union's need to communicate effectively with the employees outweighed the minimal individual privacy interest in the home address information.

IV. Positions of the Parties[1]

In its exceptions, the Respondent contends that the Judge misinterpretated section 7114(b)(4) of the Statute, being under consideration. The Union and the Respondent filed amicus briefs in response to the Authority's invitation. The Union contends that the Respondent's submissionthe Privacy Act and the Freedom of Information Act. The Respondent also argues that the Judge exceeded his authority in deciding the dispute. Finally, the Respondent contends that the disclosure of home addresses is contrary to section 7102 of the Statute.

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[1] When the Authority decided, for reasons discussed more fully in FHAFO, to review the entire issue of the release of employees' names and home addresses and invited agencies, unions, and interested persons to submit *amicus* briefs addressing the issue, this case was one of those listed as

(Continued)

V. Analysis and Conclusion

As noted above, in our decision on remand in FHAFO we concluded that the release of home addresses of bargaining unit employees to the exclusive representatives of those employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114(b)(4). We also determined that agencies are required to furnish such information without regard to whether alternative means of communication are available. Moreover, we further conclude that the disclosure of home addresses will not interfere with any employee's right, under section 7102 of the Statute, "to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal." As we indicated in FHAFO, while a labor organization's desire to communicate with all the employees in its unit of recognition is consistent with its statutory responsibility to represent those employees, individual employees are free to ignore such communications if they so choose. Based on our decision on remand in the FHAFO case, we find that the Respondent in this case was required to furnish the Union with the home addresses of the unit employees. Thus, we conclude that the Respondent's refusal to furnish the requested information in this case constituted a violation of section 7116(a)(1), (5), and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service

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(Continued)
should not be accepted because it was filed one day late. The Authority accepted and considered some amicus submissions that were received shortly after the date set in the Authority's Federal Register notice, including the Respondent's amicus brief. However, we note that there is nothing in the disputed submission that would alter our decision in this matter.

Labor-Management Relations Statute, it is ordered that the Department of Health and Human Services, Social Security Administration, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request by the American Federation of Government Employees, AFL-CIO, National Council of SSA Field Assessment Locals, the exclusive representative of its employees, the home addresses of all Atlanta Region employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the American Federation of Government Employees, AFL-CIO, National Council of SSA Field Assessment Locals, the exclusive representative of its employees, furnish it with the home addresses of all Atlanta Region employees in the bargaining unit it represents .

(b) Post at all its facilities within the Atlanta Region where bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, National Council of SSA Field Assessment Locals are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, Atlanta Region, Social Security Administration, Department of Health and Human Services, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., December 18, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request by the American Federation of Government Employees, AFL-CIO, National Council of SSA Field Assessment Locals, the exclusive representative of our employees, the home addresses of all Atlanta Region employees in the bargaining unit it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the American Federation of Government Employees, AFL-CIO, National Council of SSA field Assessment Locals, the exclusive representative of our employees, furnish it with the home addresses of all Atlanta Region employees in the bargaining unit it represents.

____
(Activity)

Dated:__________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region IV, Federal Labor Relations Authority, whose address is: 1371 Peachtree Street, N.E., Suite 736, Atlanta, GA 30367 and whose telephone number is: (404) 347-2324.

(24 FLRA No. 60)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION

Respondent

and

Case No. 4-CA-40452

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

. . . .

Carl Clayton, Esquire
For the Respondent

Regina N. Kane, Esquire
For the General Counsel

Mr. Barry Nelson
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1], and the Federal Rules and Regulations issued thereunder, 5 C.F.R. §2423.1, et seq., concerns a refusal to furnish home addresses of bargaining unit employees. This proceeding was initiated by a charge filed on June 4, 1984 (G.C. Exh. 1(a)). The Complaint and Notice of

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7114(b)(4) will be referred to, simply, as "§ 14(b)(4)."

Hearing issued on December 19, 1984, and hearing was set for January 18, 1985 (G.C. Exh. 1(c)). By Order dated January 4, 1985 (G.C. Exh. 1(f)) the hearing was postponed indefinitely; by Order dated January 8, 1985 (G.C. Exh. 1(g)) the hearing was rescheduled for February 21, 1985, at a place to be determined; and by Order dated February 14, 1985 (G.C. Exh. 1(h)) the place of hearing was fixed, pursuant to which a hearing was duly held on February 21, 1985, in Birmingham, Alabama, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument which each party waived. At the close of the hearing, March 21, 1985, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, initially upon timely motion of General Counsel, with which the other parties concurred, for good cause shown, to April 22, 1985, and later, upon timely motion of Respondent, to which the other parties did not object, for good cause shown, to May 22, 1985. Respondent and General Counsel each timely mailed an excellent brief, received on, or before, May 22, 1985, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. The American Federation of Government Employees, AFL-CIO, (hereinafter, also referred to as "AFGE") is the exclusive representative of certain of Respondent's nonprofessional and professional employees as more fully set forth in the Agreement of the Parties (G.C. Exh. 5, Recognition and Coverage, p. 1). AFGE, in turn, has various national councils including the AFGE National Council of SSA Field Assessment Locals (G.C. Exh. 5, Art. 4, Section 2 A, p. 7, Tr. 12)(hereinafter referred to as the "Union"). Mr. Barry Nelson is the Administrative Director of the Union; a Regional Vice President for Field Assessment for the Atlanta Region; and is a member of the AFGE General Committee representing the Social Security Administration (Tr. 12).

2. By letter dated April 13, 1984 (G.C. Exh. 2), Mr. Nelson, pursuant to § 14(b)(4) of the Statute, requested:

> "(1) The names of all bargaining unit employees in the Atlanta Region represented by the National Council of SSA Field Assessment Locals, and;
>
> "(2) The addresses of all unit employees identified above.
>
> . . . ." (G.C. Exh. 2).

3. By letter dated April 27, 1984, Respondent supplied the names and addresses [office addresses] of all bargaining unit employees as requested (G.C. Exh. 3 and Enclosure 1). As the Enclosure shows, there were 171 bargaining unit employees in various Branches or Sections at the following locations:

101 Marietta Tower
Atlanta, Georgia

Special Studies and Analysis Branch
(Suite 2510)

ISI Analysis Branch
(Suite 2626)

Disability Analysis Branch
(Suite 2609)

Evaluation Staff
(Suite 2608)

1776 Peachtree Street, N.W.
Atlanta, Georgia

Atlanta Satellite Office
(Suite 410 North)

330 Biscayne Boulevard
Miami, Florida

Miami Field Station

2001 12th Avenue North
Birmingham, Alabama

Birmingham Satellite Office
RSI Analysis Branch

There were 96 unit employees at 101 Marietta Tower Atlanta; 20 at 1776 Peachtree Street, Atlanta; 4 at Miami; and 51 at Birmingham. Of the 171 unit employees, only 30 are members of the Union (Tr. 32).

4. By letter dated May 11, 1984, Mr. Nelson stated that what he really wanted was the home addresses of all unit employees, not their office addresses (G.C. Exh. 4).

5. By letter dated May 25, 1984, Ms. Maxine McNutt, Director, Field Assessment Office, declined to supply the home addresses of unit employees stating, in part, as follows:

> ". . . The request for home addresses . . . is denied. Providing such information would be an invasion of personal privacy and is withheld under the Privacy Act and Exemption 6(six) of the Freedom of Information Act." (G.C. Exh. 5).

6. The current National Agreement of the Parties (G.C. Exh. 6) provides, in part, as follows:

> Article 11, Section 4 - Public Address System
> "The Administration will continue to make the public address system available with established practices to those facilities where union use was in effect as of June 10, 1980."
>
> Article 11, Section 6 - Other Facilities and Services
> "The Administration agrees to furnish, where available, customary and routine services . . . Such services include internal mail (for other than mass mailings) . . . ."
>
> Article 12, Section 1 - Bulletin Board
> [management must provide]
>
> Article 12, Section 2 - Distribution of Union Publications
> "A. Official publications of the Union may be distributed on SSA property by union representatives during the non-duty time of the Union representatives who are distributing and the employees receiving the materials . . . .
>
> "B. The Administration agrees to distribute officially designated union newsletters on a desk-to-desk basis in Headquarters, Program Service Centers and Data Operations Centers. This will not preclude employer distribution in other installations if mutually agreed to.
>
> "This distribution will be limited to four (4) times per year unless mutually agreed to . . .
>
> Article 6 - Addressing New Employees
> "Where such practices exist as of the effective date of the agreement [June 11, 1982], the

> Administration will continue to provide the Union an opportunity to address new employees during orientation sessions . . . ." (G.C. Exh. 6).

7. In his requests of April 13 (G.C. Exh. 2) and May 11 (G.C. Exh. 4), Mr. Nelson stated no reason or justification for the addresses of unit employees, and Respondent's only stated reason for denying home addresses was, as set forth in General Counsel's Exhibit 5, Subsection (b)(6) of the Freedom of Information Act and the Privacy Act (Tr. 17).

8. Mr. Nelson testified that he had several reasons for wanting the home addresses: First, to get employee input in connection with the imminent negotiations of a supplemental agreement (authorized by Article 5 of the National Agreement)(Tr. 17-18, 19-20, 21, 22-23, i.e., solicitation of opinions (Tr. 56). Second, to alert bargaining unit employees to office closings (Tr. 23-24; 25) and reorganizations (Tr. 30-32). Third, to advise unit employees of settlement agreements (unfair labor practice charge)(Tr. 28). Fourth, to let employees know the type of activities the Union is conducting (Tr. 29).

9. The Union has a steward for unit employees at each building except at Miami (Tr. 37-38).

10. Mr. Nelson stated that the Union had never distributed material, pursuant to Article 12, Section 2 A, in the Atlanta Region (Tr. 39); nor had it ever used Respondent's internal mail system (Article 11, Section 6) (Tr. 39-40). Mr. Nelson stated that the Union had no ". . . agreement with the FAO portion to do any distributing for us." (Article 12, Section 2 B)(Tr. 40).

11. The Union has a publication, The Sentinel, which is issued sporadically (Tr. 42-43). Copies are placed in racks at the Program Service Center in Birmingham from which employees may take a copy, copies are mailed "sometimes" to members, and management distributes copies desk-to-desk in the Program Service Center up to four times per year (Tr. 43). The Sentinel is not distributed at Atlanta but copies are sent to stewards for posting on the bulletin boards (Tr. 44).

12. Mr. Nelson stated that he had not used the bulletin boards to solicit input because ". . . I don't necessarily want . . . management to know that [sic] I am asking employees" (Tr. 45).

13. Individual employee records (standard Form 7-B (G.C. Exh. 8) are retained by each employee's immediate supervisor (G.C. Exh. 9, Tr. 47-48) and each card has a place for the employee's home address. Home addresses also are shown on each employee's pay slip (Tr. 49). A copy of each pay slip goes to the timekeeper who is located in the same office as the staff, i.e., each staff has its own timekeeper (Tr. 49-50). Personnel

files for Field Assessment employees are maintained in the Atlanta Regional Office (Tr. 50) and home addresses are shown on the SF-171. Although Regulations (G.C. Exh. 10) provide for locator files, Mr. Cannon Hassell, Manager of the RSI Analysis Branch, Birmingham, since January, 1983, and previously Director of the Division of Payment and Eligibility Quality, in FAO (Field Assessment Office), and, prior to that, Director of the Office of Quality Assurance for the Atlanta Region, Atlanta, Georgia, testified that neither the FAO Region in Atlanta nor Birmingham maintains locator cards either in individual offices or in a central file (Tr. 84, 86, 90, 91) and that the only place the home addresses are kept is on the B-7 and on the pay slip which is kept by the timekeeper (Tr. 84). Mr. Hassell testified that to generate a list of names with home addresses of every FAO employee it would be necessary to go either to each supervisor and ask the supervisor to supply the data from the 7-B files which he maintains, or to go to each timekeeper and have each timekeeper pull the names and addresses from the pay slips[2] (Tr. 84-85).

14. Mr. Grady K. Lancaster, a Quality Case Analyst, RSIAB, Birmingham, stated that he objected to his home address being given to the Union or anyone, ". . . unless I personally authorize it." (Tr. 95-96). He further stated, ". . . my privacy is my privacy, and I don't want anyone to infringe upon it." (Tr. 96).

15. Ms. Martha Foster, Secretary to the Branch Manager, RSI Analysis Branch, stated that she personally objected to delivery of her home address to the Union without her knowledge and consent (Tr. 97-98). Ms. Foster stated that there had always been time enough on breaks and at lunch to talk about union matters (Tr. 98) and at no time had any Union representative asked for her home address so it could go on a Union mailing list (Tr. 98). She stated that she received the Sentinel at work (Tr. 99).

16. Mr. Brack Hawkins, a Reviewer and Examiner in QA, RSIAB, stated that he prefered that his home address not be given to the Union; that he found it objectionable that his home address be released to the Union without his knowledge and consent (Tr. 100). Mr. Hawkins had joined the Union at one point but had ". . . got out" (Tr. 101).

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[2] Mr. Hassell stated that central Payroll Records on home addresses are not always current. For example, he stated that when he moved from Atlanta to Birmingham it was 7 or 8 months before his address was changed on his pay slip (Tr. 85) and in 1984 state taxes were still charged to him in Georgia (Tr. 85).

Conclusions

This case involves only the request for names and home addresses of bargaining unit employees in the Atlanta Region represented by the National Council of SSA Field Assessment Locals - a total of about 171 employees. It is clear that this request is only the beginning, as Mr. Nelson stated that "We were going to go to each region and ask for them individually . . . ." (Tr. 54-55). No list exists in the Atlanta Region containing the collected names and home addresses of bargaining unit employees; however, there is no dispute that the names and home addresses are maintained on individual employees, on the individual employee record (Standard Form 7-B) kept by the employee's immediate supervisor or on the individual employee's pay stub kept by the timekeeper. The cost of preparing the requested list of names with home addresses was neither shown nor established. The record shows only that in Birmingham if the 7-B files were used it would be necessary to obtain the data from 8 managers; and if the payroll stubs were used the data would have to be obtained from three timekeepers. The number of people that would be involved in Atlanta (101 Marietta Tower and 1776 Peachtree Street) was not shown. Since there is one manager at Miami and only four unit employees, it is assumed that only one person would be involved at Miami. Consequently, although Respondent would be required to copy names and addresses from individual employee records, either from form 7-B's or payroll stubs, such task is neither so burdensome nor costly as to warrant denial of the Union's request if the Union's request is consistent with § 14(b)(4) of the Statute and is not prohibited by the Privacy Act, 5 U.S.C. § 552a. § 14(b)(4) of the Statute requires an agency to furnish to the exclusive representative, upon request, data;

> "(B) which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining . . . ." (5 U.S.C. § 7114 (b)(4)(B)).

As noted above, the names and addresses of bargaining unit employees are reasonably available; and the record shows that the Union sought the home addresses principally to get employee input in connection with negotiation of a supplemental agreement and to alert bargaining unit employees of office closings and reorganizations, although the Union stated that it also wanted the addresses to advise unit employees of settlement agreements and to let them know the type of activities the Union was conducting. Is the desire to obtain input from non-members in connection with negotiation of a supplemental agreement necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining? While conceivably helpful, in all candor, I have always viewed such professed justification with great skepticism. My skepticism stems, in part, from long recognition that views of non-members are not always received with enthusiasm by members, see, for example, American Federation of Government Employees, Local 2000, AFL-CIO, 14 FLRA No. 85 (1984); and, in part, from the fact that unions through their members, even though membership may, as here, be small, and through their day-to-day confrontation with problems affecting the bargaining unit are well aware of areas where they desire changes in, or additional to, their collective bargaining agreements. Indeed, in Magma Copper Company, San Manuel Division, 208 NLRB 329 (1974) the National Labor Relations Board stated:

> ". . . A list of employees' names and addresses is clearly not a matter pertaining to the negotiation of new 'rates of pay, wages, hours of employment or other conditions of employment . . .'" (208 NLRB at 329)(the Board held, however, that names and addresses were necessary to fulfill the union's statutory obligation to administer the agreement on behalf of all unit employees and, because alternate means of communicating with employees [bulletin boards, stewards, distribution of literature] were inadequate, ordered the names and addresses furnished).[3]

In Shell Oil Co. v. NLRB, 457 F. 2d 615 (9th Cir. 1972) denying enf't of 190 NLRB 101 (1971)(because the Company's fear of harassment of non-union employees reasonable justified its refusal to supply names and addresses of all unit employees), the employer had offered to supply the Union names and addresses of all bargaining unit employees who consented or to furnish the names and addresses of all bargaining unit employees to an independent mailing service which, upon receipt of sealed and stamped envelopes, would address the envelopes and mail them to employees at their home addresses, the employer to pay the full additional cost of the mailing service without limitation on the number or frequency of mailings desired by the union. Notwithstanding the offer of a means to communicate freely with all employees at their home addresses, the union insisted upon it having the home addresses in order, as the union's district director testified, in part:

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[3] In NLRB v. Wyman Gordon Co., 394 U.S. 759 (1969), the Supreme Court ordered enforced the Board's order directing the employer to furnish names and addresses prior to a representation election, although the Court severely criticized the Board's failure to follow the Administrative Procedures Act in issuing a legislative rule in Excelsior Underwear, Inc., 156 NLRB 1236 (1966) in total disregard for the requirements of the Rule making Provisions of the APA.

> ". . . that it was essential for the Union to be able not only to mail communications to the employees but also to have 'its leadership' make personal visits to employees' homes in order to organize them, 'close the ranks,' . . . ." (457 F. 2d at 617)

I strongly suspect than in all requests for names and home addresses a primary objective, whether admitted or not, is organization. (See, dissenting opinion of Judge Friendly, *Prudential Insurance Company* v. *NLRB*, 412 F. 2d at 85 (2d/Cir. 1969). If proper for purposes of organization prior to a representation election, *Wyman Gordon*, *supra*; *Excelsior Underwear*, *supra*, coupled with a union's statutory obligation to administer the agreement, *Magma Copper*, *supra*, production of names and home addresses in non-representation election situations has, certainly, been upheld by the courts where there was no clear danger of harassment of non-union employees (*e.g.*, following strikes) and alternate means of communication were inadequate. *United Air Craft Corp.* v. *NLRB*, 434 F. 2d 1198 (2d/Cir. 1970), *cert. denied*, 401 U.S. 993 (1971); *Prudential Insurance Co.* v. *NLRB*, 412 F. 2d 77 (2d/Cir. 1969), *cert. denied*, 396 U.S. 928 (1969); *Standard Oil Co. of California* v. *NLRB*, 399 F. 2d 639 (9th Cir. 1968). Indeed, in *Prudential Insurance Co.*, *supra*, the Court stated, in part, as follows:

> ". . . In this instance it is urgent so that the exclusive bargaining representative of the employees may perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests. Because this information is therefore so basically related to the proper performance of the Union's statutory duties, we believe any special showing of specific relevance would be superfluous.
>
> "Prudential's complaint that the Union may use this information to solicit new members within the unit is simply of no moment. As the Board has so appropriately indicated, there is no clear distinction between informing non-member agents about the benefits it has obtained and hopes in the future to secure for them and its solicitation of their support. In any case, Union solicitation is itself hardly an evil - especially where, as here, the Union is already the exclusive bargaining representative of the employees it is soliciting . . . ." (412 F. 2d at 84-85).

In *Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida*, A/SLMR No. 214, 2 A/SLMR 523 (1972), although the Hearing Examiner, whose recommended decision was adopted by the Assistant Secretary, cited with approval NLRB and court decisions that a collective bargaining representative is entitled, upon request, to receive from an employer the names and addresses of the employees in the bargaining unit if it has no other effective means of communicating with them, he recommended that the complaint be dismissed because Complainant had failed to show that it did not have other effective means of communicating with employees. On appeal to the Federal Labor Relations Council, the Council sustained the Assistant Secretary's dismissal of the complaint; however, the Council stated, in part, as follows:

> ". . . in our opinion, the implementation of the provisions of section 10(e) of the Order[4] requires that the exclusive representative have effective means of communicating with unit employees. Moreover, agencies, as part of their obligation to consult, confer, or negotiate with an exclusive representative, must where appropriate, provide an exclusive representative with means of communicating with unit employees and a failure to do so would constitute a violation of Section 19(a)(6).
>
> "A determination of whether an exclusive representative in fact has effective means of communicating with unit employees must be made on a case-by-case basis. In many instances, little or no action by the agency would be necessary to supplement the means of communication readily available to the union on its own initiative. On the other hand, in some instances where because of such factors as the size of unit, geographic dispersion of employees, isolated duty locations, etc., the union may not have effective means of communicating with unit employees. In such situations, as stated above, the proper implementation of the Order might require that the agency assist the exclusive representative in facilitating such communication, consistent with law and regulation, e.g., by providing the union with the periodic use of the interagency mailing system or addressing envelopes containing union material and depositing those envelopes in the U.S. mail for delivery to employees at their home addresses. A

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[4] Section 10(e) provided that a labor organization which has been elected as the exclusive bargaining representative is entitled to act for nd to negotiate agreements covering all employees in the unit and it is esponsible for representing the interests of all employees in the unit ithout discrimination and without regard to labor organization membership.

> failure to provide the exclusive bargaining representative such access to employees in the unit, where required, would constitute a failure on the part of the agency to meet its obligation to consult, confer, or negotiate . . . in violation of section 19(a)(6) of the Order.
>
> "In the instant case, applying the criteria that a union must have effective means of communicating with unit employees, the Assistant Secretary determined, on the basis of the record, that the union did in fact have effective means of communicating with the unit employees and, therefore, IRS had no obligation to provide the Union with additional such means of communication. Accordingly, the IRS's actions did not violate section 19(a)(6) of the Order. The Assistant Secretary's decision is clearly supported by the record and consistent with the purposes of the Order.[6]
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> [6] Like the Assistant Secretary, we find it unnecessary in this case to consider the propriety of the CSC regulation which prohibits an agency from furnishing a union with the home addresses of employees." (FLRC No. 72A-50, 2 FLRC 106, 109-110 (1974)).

This remained the situation under Executive Order 11491, as amended. It must be noted that the Council did not suggest that an agency should give the Union the home addresses of bargaining unit employees. To the contrary, the Council went no further than to suggest that where appropriate: a) the agency permit periodic access to the interagency mailing system; or b) the agency address envelopes containing union material and deposit those envelopes in the U.S. mail for delivery to employees at their home addresses.

Two factors may bar applicability of private sector case law, or the decision of the Council under the Executive Order, to requests for names and home addresses under the Statute: First, § 14(b)(4) of the Statute which has no counterpart in either the National Labor Relations Act or Executive Order 11491, as amended. As noted, § 14(b)(4)(B) limits an agency's obligation to furnish data, including the names and home addresses involved herein[5], to such data as ". . . necessary for full and proper discussion, understanding, and negotiations of subjects within the scope of collective bargaining" (Emphasis supplied). The Authority has held that there is no violation if the data, requested by, but not furnished to the Union, were not necessary and relevant to assist the union in fulfilling its responsibilities under the Statute, United States Environmental Protection Agency, Health Effects Research Laboratory, Cincinnati, Ohio, 16 FLRA No. 16, 16 FLRA 52 (1984), and a complaint was dismissed where the request for names and home addresses was sought for lobbying purposes and § 14(b)(4)(B) imposes no duty to furnish the home addresses for lobbying purposes. Internal Revenue Service, Memphis Service Center and National Treasury Employees Union, Case No. 4-CA-30371 (OALJ-84-66, May 17, 1984), Administrative Law Judge Decision Report No. 38 (July 5, 1984). Second, the Privacy Act, 5 U.S.C. § 552a, enacted December 31, 1974, about eight months after the Counsel's decision in FLRC No. 72A-50, supra, which has no application to the private sector.[6] 5 U.S.C. §§ 552a(a)(1), 552(e). Each of these factors as applicable to the present request for names and home addresses is considered hereinafter.

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[5] See, Paragraphs 8 and 10 of the Complaint (G.C. Exh. 1(c)).

Privacy Act

Three quite separate Acts, enacted at different times over a ten year period and reflecting different Congressional concerns, are codified as 5 U.S.C. §§ 552, 552a, and 552b. 5 U.S.C. §552, P.L. 89-554, is the Freedom of Information Act, was enacted September 6, 1966, and, in essence, concerned disclosure of information to the public (although, as pertinent here, § 552(b)(6) excluded from such disclosure "(6) personnel . . . files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552a is the Privacy Act, P.L. 93-579, was enacted December 31, 1974, and, in essence, concerned information maintained by agencies on individuals and its disclosure. 5 U.S.C. § 552b, P.L. 94-409, is the Sunshine Act, was enacted September 13, 1976, and, in essence, concerns open meetings.

Respondent denied the request for names and home addresses specifically because, "Providing such information would be an invasion of personal privacy and is withheld under the Privacy Act [5 U.S.C. § 552a] and Exemption 6(six) of the Freedom of Information Act [5 U.S.C. § 552(b)(6)]" (G.C. Exh. 5). At hearing, Respondent asserted the same defense, coupled with the further contentions that it had made a reasonable response to the request by supplying the names and office addresses of the bargaining unit employees requested;[7] that the Union has adequate means of communicating with bargaining unit employees through alternate means; and that the data requested, i.e. home addresses, is not necessary or relevant within the meaning of § 14(b)(B) of the Statute.

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[6] The only exception is "when an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall . . . cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor . . . shall be considered to be an employee of an agency." 5 U.S.C. § 552a(m).

5 U.S.C. § 552a provides, in part, as follows:

> "(a) DEFINITIONS.- For purposes of this section -
>
> . . . .
>
> (4) the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency . . .
>
> . . . .
>
> (7) the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.
>
> "(b) CONDITIONS OF DISCLOSURE - No agency shall disclose any record which is contained in a system of records by any means of communication to any person . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be -
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> . . . .
>
> (2) required under section 552 of this title;
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> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
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> . . . .
>
> "(e) AGENCY REQUIREMENTS - Each agency that maintains a system of records shall -

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[7] It is clear that Respondent's furnishing of the names and office addresses had been fully consistent with the Union's initial request which had not specified home addresses; however, the Union then clarified, or amended, its request and asked for home addresses which Respondent denied, as noted, pursuant to the Privacy Act and § (b)(6) of the Freedom of Information Act.

. . . .

> (4) subject to the provisions of paragraph 11 of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include -
>
> . . . .
>
> (D) each routine use of the records contained in the system, including the categories of uses and the purpose of such use.
>
> . . . .
>
> (11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.
>
> "(n) MAILING LISTS.- An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.
>
> . . . . "(5 U.S.C. § 552a(a)(4), 7; (b)(3); (e)(4)(D), 11; and (n)). (Emphasis supplied).

In addition to the foregoing provisions of the Privacy Act, the Freedom of Information Act excludes disclosure, inter alia, of:

> "(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." (5 U.S.C. § 552(b)(6)).[8]

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[8] Although this case does not involve meetings, it is interesting to note that the Sunshine Act provides that at meetings the agency shall not: "(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy." (5 U.S.C. § 552b(c)(6)).

The legislative history of the Privacy Act makes it clear that employees' addresses were subject to the Act. Thus, Senate Report No. 93-1183, Government Operations Committee, September 26, 1974, to accompany S.3418, which passed in lieu of H.R. 16373, states, in part, as follows:

> "The Committee has used the term 'personal information' throughout the bill . . . Such definition includes the . . . address, by which the individual is indexed in a file or retrievable from it." (U.S. Code Congressional and Administrative News, 93d/Cong., 2d/Sen., 1974, at p. 6946)(hereinafter references to the Senate Report are referred to as "Legislative History", followed by the page reference in the U.S. Code Congressional and Administrative News).

With regard to mailing lists [Section (n) of 5 U.S.C. § 552a] the Senate Report states, in part, as follows:

> "The bill now prohibits Federal agencies from selling or renting mailing lists except as authorized by law, but does not require names and addresses to be kept confidential . . ." (Legislative History, p. 6946)[9]

The Senate Report, in setting forth the purpose and intent of the bill, stated, in part:

> "Third, the bill establishes certain minimum standards for handling and processing personal information maintained in the data banks and systems . . . to this end, it requires every department and agency to insure, by whatever steps they deem necessary:
>
> . . .
>
> "That they refrain from disclosing it unless necessary for employee duties, or from making it available outside the agency without the consent of the individual . . ." (Legislative History at pp. 6917-6918).

However, the broad protection of privacy of "personal information," recited as the purpose and object of the bill, was, and is, subject to two specific statutory exceptions as applicable herein, namely: disclosure

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[9] Section 206(a) of the Senate Bill is Section (n) of the Act. Section 206(b) of the Senate Bill, which required removal of individual names and addresses upon written request, was deleted from the legislation as enacted.

"(2) required under section 552 . . ." and disclosure "(3) for a routine use . . .", which, in practical effect, render the broad protection of personal privacy more illusory than real; and, with respect to names and addresses, the legislative history strongly suggests that Congress intended far less privacy to names and addresses than to data collected and maintained under other indicia, for example, specifically, by social security number.

Privacy Act Exemptions

1. Disclosure required under Section 552 (Freedom of Information Act). In American Federation of Government Employees, AFL-CIO, Local 1923 v. United States Department of Health and Human Services, 712 F. 2d 931 (4th Cir. 1963), a panel majority (Circuit Judge Chapman and District Judge Turk), Chief Judge Winter dissenting, in denying home addresses requested by the union, concluded that home addresses were not agency records subject to disclosure under the Freedom of Information Act because those addresses had nothing to do with the agency's work and disclosure would shed no significant light on the agency's inner workings, stating, in part, as follows:

> "Further, the records sought are not of the type that must be disclosed under § 552(a)(3). Only 'agency records' must be disclosed . . . The purpose of the Act is 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny . . . .' . . . The term 'agency records' includes only those created or complied by an agency 'in the course of doing its work . . . .' . . . The home addresses sought by appellant have nothing to do with the agency's 'work,' and disclosure thereof would shed no significant light on the agency's inner workings." (712 F. 2d at 933).

With all deference to the Court of Appeals, this view appears contrary to that stated by the Supreme Court in Department of the Air Force v. Rose, 425 U.S. 352 (1976). In Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA No. 92 (1985), the Authority stated, ". . . The theory of the FOIA, in contrast to the Privacy Act, is that all records in the possession of the agencies of the Federal Government must be disclosed upon request unless subject to a specific FOIA exemption." (Emphasis supplied). This, of course, is fully considered with the decision of the Supreme Court in Rose, supra, where the Court stated, in part, as follows:

> ". . . the Act repeatedly states, 'h at official information shall be made available "to the public," "for public inspection"' . . . There are, however,

> exemptions from compelled disclosure. They are nine in number and are set forth in § 552(b). But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. 'These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c) . . .' . . ., and must be narrowly construed . . . ." (425 U.S. at 361).

And with regard to exemption 6, which is the only exemption asserted in this case, the Court further stated, in, part, as follows:

> ". . . we find nothing in the wording of Exemption 6 or its legislative history to support the Agency's claim that Congress created a blanket exemption for personnel files. Judicial interpretation has uniformly reflected the view that no reason would exist for nondisclosure in the absence of a showing of a clearly unwarranted invasion of privacy, whether the documents are filed in 'personnel' or 'similar' files . . . Congressional concern for the protection of the kind of confidential personal data usually included in a personnel file is abundantly clear. But Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its 'personnel' files. Rather, Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.' The device adopted to achieve that balance was the limited exception, where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy." (425 U.S. at 371-372).

2. For a routine use. Subsection (a)(7) defines routine use as follows:

> "(7) the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." (5 U.S.C. § 552a(a)(7)).

Subsection (e)(4)(D) and (11) provide that,

> "(4) subject to the provisions of paragraph 11 of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include —

> (D) each routine use of the records contained in the system, including the categories of uses and the purpose of such use;
>
> "(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency." (5 U.S.C. § 552a(e)(4)(D) and (11)).

The source of the names and addresses relied upon by General Counsel in this case were either the form 7-B, maintained by each employee's immediate supervisor, or payroll stubs, maintained by timekeepers, appear to be "Personnel Records in Operating Offices, HHS/OS/ASPER."[10] The text of the notices published by the Department of Health and Human Services (HHS) were not offered in evidence, although the Federal Register citation given to Mr. Nelson was introduced (G.C. Exh. 11). The HHS notice of October 13, 1982, states that:

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[10] It is possible that these records are covered by OPM's Notice (G.C. Exh. 11) which provides, in part,

> "Records on current Federal employees are located in the Personnel Office or other designated office of the local installation of the Department or Agency which currently employs the individual. Where agencies determine that duplicates of these records need to be located in a second office, e.g., an administrative office closer to where the employee actually works, such copies are covered by this system . . . ." (G.C. Exh. 11, System Location). (Emphasis supplied).

The difference, i.e., whether the HHS notices apply or whether the OPM notice applies, concerns the respective definitions of "routine use" which are not at all the same. OPM's routine uses provides, inter alia:

> "(j) To disclose information to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions." (G.C. Exh. 11, Routine Uses of Records Maintained in the System, Including Categories of Uses and the Purposes of Such Uses) (Emphasis supplied).

> "These notices do not contain any new routine uses . . . ." (F.R. vol. 47, No. 198, p. 45402).

The October 13, 1982, notice of the Office of the Secretary (OS), Office of the Assistant Secretary for Personnel Administration (OASPER), HHS, with regard to Personnel Records in Operating Offices, which includes:

> ". . . a variety of records relating to personnel actions and determinations made about an individual while employed. These records may contain information about an individual relating to name; birth date; home address . . . pay and leave . . . ." (F.R. vol. 47, No. 198, pp. 45761-45762).

This notice defines routine use to include, as pertinent,

> "(8) where a contract between a component of the Department and a labor organization recognized under E.O. 11491 or 5 U.S.C. Chapter 71 provides that the agency will disclose personal records relevant to the organization's mission, records in this system of records may be disclosed to such organization." (F.R. vol. 47, No. 198, p. 45762).

The office of the Assistant Secretary for Management and Budget (ASMB) notice of October 13, 1982, concerns "Telephone Directory/Locator System," located at "Operating Offices and Facility Complexes of the Department - Employee Locators and Offices of Administrative or Management Services," does not provide for home address (see, Categories of Records in the September, F.R. vol. 47, No. 198 at p. 45517).[11]

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[11] Routine uses for records maintained in this system are:

> In the event of litigation where the defendant is (a) the Department, any component of the Department, or any employee of the Department in his or her official capacity; (b) the United States where the Department determines that the claim, if successful, is likely to directly affect the operations of the Department or any of its components; or (c) any Department employee in his or her individual capacity where the Justice Department has agreed to represent such employee, the Department may disclose such records as it deems desirable or necessary to the Department of Justice to enable that Department to present an effective defense, provided such disclosure is compatible with the purpose for which the records were collected. (F.R. vol. 47, No. 198, p. 45517).

The significance of the "routine use" exemption remains uncertain as its applicability as a vehicle for disclosure has been little explored. See, Parks v. United States Internal Revenue Service, 618 F. 2d 677 (10th Cir. 1980); American Federation of Government Employees v. Defense General Supply Center, 423 F. Supp. 481 (E.D. VA. 1976), aff'd, 573 F. 2d 184 (4th Cir. 1978). In the present case, if HHS's notice applies, as it would appear it does to the particular records relied upon as the source of names and home addresses, disclosure would not be permitted as a routine use for the reason that no contract provides that Respondent will disclose personal records. Cf. General Counsel Exh. 6, Art. 3, Secs, 4 and 5, pp. 4-5. If the OPM notice were applicable, then disclosure, as a routine use, would be authorized if the names and home addresses were,

> ". . . relevant and necessary to their [officials of recognized bargaining representatives] duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions."

The OPM standard for disclosure as a routine use, while different, nevertheless, closely approximates the standard of § 14(b)(4)(B) of the Statute to furnish information, ". . . necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargainings." 5 U.S.C. § 7114(b)(4)(B).

Disclosure of Home Addresses

In Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, supra, the Authority first held that,

> ". . . the restrictive language in Section 7114(b)(4) of the Statute, limiting an agency's duty to furnish data 'to the extent not prohibited by law,' incorporates the Privacy Act." (17 FLRA No. 92, p. 4).

and then held that,

> ". . . The exception set forth in 5 U.S.C. § 552a(b)(2) permits disclosure of Privacy Act - protected information to the extent that such information is 'required' to be released under the Freedom of Information Act (FOIA). [footnote omitted]. The theory of the FOIA, in contrast to the Privacy Act, is that all records in the possession of the agencies of the Federal Government must be disclosed upon request unless subject to a specific FOIA exemption. [footnote omitted]. Under exemption (b)(6) of the FOIA, an agency is allowed to withhold personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy. (17 FLRA No. 92, p. 4).

. . .

> "The balance to be drawn under the FOIA's (b)(6) exemption is one between the protection of the individual's right to privacy and the promotion of important public interests. [footnote omitted]. In determining whether 'necessary' data under section 7114(b)(4) of the Statute should be disclosed to the Union, the Authority will balance the necessity of the data for the Union's purposes against the degree of intrusion on the individual's privacy interests caused by disclosure of the data . . . ." (17 FLRA No. 92, p. 5).

The threshold question is whether home addresses are "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" (§ 14(b)(4)(B)). Read literally, it would be difficult to conclude that home addresses are necessary for collective bargaining; but, as Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, supra, demonstrates, the language of § 14(b)(4)(B) consistently has been given a much broader construction than merely negotiating collective bargaining agreements; was directly held to encompass possible grievance proceedings; and, although the Authority did have to go further, nor did it purport to do so, I conclude that § 14(b)(4) reaches any data necessary for the Union "to pursue its representational duties" (17 FLRA No. 92, p. 6). Although, for reasons fully set forth above, I strongly question the necessity of home addresses for purposes of negotiating collective bargaining agreements, but fully recognized that home addresses may be helpful; nevertheless, I fully agree with the statement of the Court in Prudential Insurance Co., supra, that the Union needs the home addresses of members of its bargaining unit,

> ". . . so that exclusive bargaining representative of the employees may perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests. Because this information is therefore so basically related to the proper performance of the union's statutory duties, we believe any special showing of specific relevance would be superfluous." (412 F. 2d at 84).

Use of bulletin boards, stewards, and the Union's publication, The Sentinel, while important, do not afford effective means for a union to communicate directly with all members of its bargaining unit in performing the broad range of its statutory duties. In considering like requests for names and home addresses, Administrative Law Judges have recommended production in the following cases: Defense Mapping Agency Aerospace Center, St. Louis, Missouri and National Federation of Federal Employees, Local 1827, Case No. 7-CA-20482 (OALJ-83-85, Judge Cappello, May 12, 1983); Philadelphia Naval Shipyard and Philadelphia Metal Trades Council, Case No. 2-CA-40243 (OALJ-84-114, Judge Sternburg, September 24, 1984); Social Security Administration, Northeastern Program Service Center and American Federation of Government Employees, Local 1760, AFL-CIO, Case No. 2-CA-30643 (OALJ-85-024, Judge Naimark, November 30, 1984); and Department of the Navy, Portsmouth Naval Shipyard (Portsmouth, New Hampshire) and Federal Employees Metal Trades Council, AFL-CIO, Case No. 1-CA-40290 (OALJ-85-80, Judge Oliver, April 25, 1985), and have denied production in the following cases: Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employees, Local R7-23, Case No. 5-CA-40232 (OALJ-85-72, Judge Oliver, April 9, 1985); Farmers Home Administration Finance Office, St. Louis, Missouri and American Federation of Government Employees, Local 3354, AFL-CIO, Case No. 7-CA-30560 (OALJ-84-109, Judge Scalzo, September 24, 1984). In the two cases denying production of names and home addresses, it was found that alternate means of communication provided effective means of communicating with bargaining unit employees and, therefore, that the General Counsel had not established that names and home addresses were necessary for the purposes of § 14(b)(4)(B). As stated above, I conclude that the Union here does not have adequate alternate means of communicating with bargaining unit employees and that the names and home addresses are necessary for the Union's performance of the broad range of its statutory duties, and I specifically endorse and adopt the further statement of the Court in Prudential Insurance Co., supra, that, even if the Union may use the information to solicit new members,

> ". . . union solicitation is itself hardly an evil - especially where, as here, the union is already the exclusive bargaining representative of the employees it is soliciting" (412 F. 2d at 85).

As the Authority stated in Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, supra, "In determining whether 'necessary' data under section 7114(b)(4) of the Statute should be disclosed to the Union, the Authority will balance the necessity of the data for the Union's purposes against the degree of intrusion on the individual's privacy interests caused by disclosure of that data." I am well aware that three employees testified that they strongly objected to their home addresses being given to the Union. The right to personal privacy is certainly a right deserving of scrupulous protection, but I do not believe the right to privacy in one's home address, in the total absence of any evidence of possible harassment, is a right of privacy entitled to protection against disclosure to the exclusive bargaining representative. At the outset, I am mindful that the legislative history of the Privacy Act states that "The bill now prohibits Federal agencies from selling or renting mailing lists . . . but does not require names and addresses to be kept confidential . . . ." (Legislative History, p. 6946) (Emphasis supplied. As Judge Oliver noted in Department of the Navy, Portsmouth Naval Shipyard (Portsmouth, New Hampshire), supra,

> ". . . The daily personal mail of most persons brings a steady barrage of unsolicited flyers, advertisements, and solicitations. Employees may have to spend a moment or two deciding whether to read the Union's newsletter or to toss it out with other unwanted mail. Considering the needs of the Union to effectively communicate with unit employees, any intrusion on employees' personal privacy caused by the furnishing of home addresses to the Union for representational purposes is minimal and not unwarranted."

Finally, I fully adopt the cogent, well reasoned, and wholly persuasive analysis of Chief Judge Winter in his dissenting opinion in American Federation of Government Employees, AFL-CIO, Local 1923, supra, where he stated, in part, as follows:

> The right to privacy in one's home address is an interest of little value. We held in Robles v. Environmental Protection Agency, 484 F.2d 843 (4 Cir. 1973), that while Exemption 6 of 5 U.S.C. § 552(b) encompassed the names and addresses of homeowners residing in dwellings where uranium tailings were used as fill dirt, the trust of Exemption 6 was to protect things that 'contain "intimate details of a highly personal nature.'" Id. at 845. Thus, although protected to some extent, disclosure of the names and addresses should therefore be denied only when disclosure would constitute a "'clearly unwarranted invasion of personal privacy.'" Id. Reliance was placed on Getman v. NLRB, 450 F.2d 670, 675 (D.C. Cir. 1971). In Getman, law professors engaged in a labor voting study sought to compel the Board to provide them with the names and addresses of employees eligible to vote in certain elections. They wished to request such employees to accede to an interview. Their right to obtain the requested informaiton was upheld, the court saying:
>
> > [A]lthough a limited number of employees will suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed in

> connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor. Id. at 674-75 (footnote eliminated).
>
> The common sense of the decisions in Robles and Getman is readily apparent. With rare exception, there is little privacy in one's name and home address. Such information is a matter of public record in motor vehicle registration and licensing records, voting lists, and real property records. Other sources from which it may often be obtained are telephone directories and city directories. In short, it is the rare individual who has any real privacy interest in the identity of his residence.
>
> . . . .
>
> The union is not a mere interloper in the Social Security Administration Headquarters. By the enactment of 5 U.S.C. § 7101, Congress has determined that 'labor organizations and collective bargaining in the civil service are in the public interest.' As I previously stated, this union is the certified collective bargaining agent. As such, it is under a duty to represent all employees in the unit whether they are union members or not. 5 U.S.C. § 7114(a)(1). The necessity of direct communication with those it is statutorily obligated to represent is to me apparent. I think it has a duty to advise its constituents of its activities, and it may wish to seek an expression of their views, by soliciting them as members or otherwise. Thus I would conclude that disclosure of the addresses of employees it represents to the union is in the interest of the union and in turn in the public interest.
>
> In summary, I perceive the balance between the competing interests in this case to be in favor of disclosure . . . ." (712 F.2d at 933-934).

Respondent's conduct in refusing to grant the Union's request for the names and home addresses of bargaining unit employees, contrary to the requirements of § 14(b)(4) of the Statute, violated §§ 16(a)(1) and (8) of the Statute and further constituted a refusal to bargain in good faith in violation of §§ 16(a)(1) and (5) of the Statute. It is, therefore, recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the Department of Health and Human Services, Social Security Administration, shall:

1. Cease and desist from:

   (a) Refusing and failing to furnish, upon request of American Federation of Government Employees, AFL-CIO, the names and home addresses of all unit employees in the Atlanta Region represented by the National Council of SSA Field Assessment Locals.

   (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise or their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

   (a) Upon request of the American Federation of Government Employees, AFL-CIO, furnish it with the names and home addresses of all unit employees in the Atlanta Region represented by the National Council of SSA Field Assessment Locals.

   (b) Post at its facilities, in each branch or section of the Atlanta Region employing Field Assessment employees constituting the bargaining unit represented by the National Counsel of SSA Field Assessment Locals, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Field Assessment Office, Atlanta Region, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, Suite 501, North Wing, 1776 Peachtree Street, N.W., Atlanta, Georgia 30309, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 31, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse or fail to furnish, upon request of the American Federation of Government Employees, AFL-CIO, the names and home addresses of all unit employees in the Atlanta Region represented by the National Council of SSA Field Assessment Locals.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the American Federation of Government Employees, AFL-CIO, furnish it with the names and home addresses of all unit employees in the Atlanta Region represented by the National Council of SSA Field Assessment Locals.

____
(Agency or Activity)

Dated: ____________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IV, whose address is: Suite 501, North Wing, 1776 Peachtree Street, N.W., Atlanta, Georgia 30309, and whose telephone number is: (404) 881-2324.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL GUARD BUREAU

Respondent

and Case No. 3-CA-60128

ASSOCIATION OF CIVILIAN
TECHNICIANS

Charging Party/Union

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. Briefs for the Authority's consideration were filed by the Respondent and the General Counsel.

The complaint alleges that the National Guard Bureau (Respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by instituting a substantive change in conditions of employment without affording the Charging Party, Association of Civilian Technicians (ACT), prior notice and a reasonable time to present its views and recommendations regarding the change, pursuant to its previously granted national consultation rights, as required by section 7113 of the Statute. Specifically, by memorandum to all Adjutants General dated June 21, 1985, the Respondent implemented an expansion of its "Mix-of-the-Force" policy without prior notice to ACT. The expanded policy allows non-bargaining unit Active Guard/Reserve Military personnel to fill certain bargaining unit technician positions formerly occupied solely by civilian technicians.

II. Facts of the Case

At all times material herein, ACT has been granted national consultation rights by the National Guard Bureau under section 7113 of the Statute. By memorandum to the Adjutants General of all States, Puerto Rico, the Virgin Islands, Guam and the District of Columbia dated June 21, 1985, the National Guard Bureau implemented an expansion of its Mix-of-the-Force policy.[1] Paragraph 5(b) of the policy announcement listed twelve (12) job classifications which could be filled by Active Guard/Reserve Military personnel. The twelve (12) job classifications were positions which had previously been reserved exclusively for civilian technicians.

III. The Issue

The issue in this case is whether the National Guard Bureau violated section 7116(a)(1) and (5) of the Statute by issuing, without consulting with ACT under section 7113 of the Statute, the June 21, 1985 Memorandum.

VI. Positions of the Parties

The arguments of the parties are essentially the same as those set forth in National Guard Bureau, 22 FLRA No. 90 (1986). In summary, the Agency asserts that it had no obligation to consult with ACT under section 7113 because the memorandum would have no actual immediate impact and little, if any, forseeable impact on bargaining unit employees. The General Counsel argues that through the memorandum the Respondent instituted a substantive change in conditions of employment of certain bargaining unit employees without fulfilling its obligations under section 7113 of the Statute.

V. Analysis

This case, like National Guard Bureau, 22 FLRA No. 90 (1986), involves the application of section 7113 of the Statute. Section 7113(b)(1) of the Statute requires an agency to inform a labor organization having national consultation rights with the agency of any substantive changes in conditions of employment proposed by the agency and to provide the labor organization with reasonable time to present its views and recommendations regarding the changes and to consider such views and recommendations before taking final action.

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[1] This memorandum is the same memorandum as that which was the focus of the complaint in National Guard Bureau, 22 FLRA No. 90 (1986).

As noted in *National Guard Bureau*, in order for the consultation obligation set forth in section 7113(b)(1) of the Statute to apply, there must be a substantive change in conditions of employment. Section 7103(a)(14) of the Statute defines conditions of employment as "personnel policies, practices, and matters, whether established by rule, regulation or otherwise, affecting working conditions[.]"

This case involves the same circumstances and arguments as involved in *National Guard Bureau*.[2] For the reasons expressed in that case we find that the Agency's June 21, 1985 policy announcement constituted a substantive change in personnel policy. Since ACT had national consultation rights, the National Guard Bureau was obligated to comply with the provisions of section 7113(b)(1) of the Statute prior to finalizing the changes. Thus, the National Guard Bureau was required to notify ACT and provide ACT with the opportunity to present its views and recommendations and to consider such views or recommendations before it issued the June 21, 1985 Memorandum. This was not done. Therefore, we conclude that the National Guard Bureau failed to comply with its obligation to consult under 7113(b)(1) of the Statute.

VI. Conclusion

The Authority has considered all the facts and circumstances of this case, including the positions of the parties. The Authority concludes that the Respondent failed to fulfill its obligation to consult with ACT pursuant to section 7113(b)(1) of the Statute prior to issuing its June 21, 1985 Memorandum expanding its Mix-of-the-Force policy and, thus, the Respondent violated section 7116(a)(1) and (5) of the Statute. Therefore, the Respondent shall be ordered to provide ACT, pursuant to its national consultation rights under section 7113 of the Statute, with reasonable time to present its views and recommendations concerning procedures pertaining to the impact and implementation of the expanded Mix-of-the Force policy.[3]

---

[2] In *National Guard Bureau*, the parties stipulated to the number of civilian technicians actually assigned to the 12 positions in 19 states in which the union involved in that case held exclusive recognitions. No similar facts were included in the stipulation in this case. In its brief, the Agency has included figures similar to those stipulated to in the previous case as well as its projections as to the "foreseeable" impact of the new policy based on those figures and its estimates of attrition rates. However, in any matter submitted directly to the Authority for decision based on a stipulation of facts, the Authority will consider only facts contained in the stipulation. *See*, *e.g.*, *General Services Administration*, 6 FLRA 430 (1981).

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority's and section 7118 of the Statute, the Authority hereby orders the National Guard Bureau shall:

1. Cease and desist from:

(a) Failing to inform the Association of Civilian Technicians (ACT) pursuant to ACT's national consultation rights under section 7113 of the Statute, of proposed substantive changes in conditions of employment, and failing to provide ACT with a reasonable period of time to present its views and recommendations regarding the proposed changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide the Association of Civilian Techinicians, pursuant to its national consultation rights under section 7113 of the Statute, a reasonable period of time to present its views and recommendations concerning procedures pertaining to the impact and implementation of the expanded Mix-of-the-Force policy, and thereafter, comply with the requirements of section 7113(b)(2) of the Statute.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, Army National Guard, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken by the National Guard Bureau to insure that such Notices are not altered, defaced, or covered by any other material.

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[3] In the absence of a request by the General Counsel or ACT for a _status quo ante_ remedy we conclude, in the circumstances of this case, that no such remedy is warranted. _See National Guard Bureau_, 18 FLRA No. 62, slip op. at 4 n.4 (1985).

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C. December 18, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(24 FLRA No. 61)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to inform the Association of Civilian Technicians (ACT), pursuant to ACT's national consultation rights under section 7113 of the Statute, of proposed substantive changes in conditions of employment, or fail to provide ACT with a reasonable period of time to present its views and recommendations regarding the proposed changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL provide the Association of Civilian Technicians pursuant to its national consultation rights under section 7113 of the Statute, a reasonable period of time to present its views and recommendations concerning procedures pertaining to the impact and implementation of the expanded Mix-of-the Force policy, and thereafter, comply with the requirements of section 7113(b)(2) of the Statute.

____
(Activity)

Dated:________________ By: __________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: P.O. Box 33758, 1118 18th Street, NW., Room 700, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION AND
SOCIAL SECURITY ADMINISTRATION FIELD OPERATIONS
NEW YORK REGION

Respondent

and

Case No. 2-CA-50222

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Charging Party (Union) to the attached decision of the Administration Law Judge. The issue is whether it is an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent (Agency) to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Union with the home addresses of employees of the Respondent's New York Regional District and Branch Offices who are represented by the Union's Local 3369 (AFGE Local 3369) as part of a national exclusive unit represented by the Union.

In a recent Decision and Order on Remand, Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA No. 101 (1986) (FHAFO), we reviewed the Authority's previous decision concerning the release of the names and home addresses of bargaining unit employees to exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that the release of the information is generally required without regard to whether alternative means of communication are available. Consistent with our decision on remand in FHAFO, we conclude that the Respondent's refusal to provide the Union with the home addresses of bargaining unit employees sought in this case violated section 7116(a)(1), (5) and (8) of the Statute.

II. Facts

The Union is the exclusive representative for many of the Respondent's employees, who are grouped in various nationwide bargaining units. AFGE Local 3369, which acts as an agent for the Union in representing New York Region employees who work within Areas I, II, III, and IX, requested the names and home addresses of all the Respondent's New York Regional District and Branch Office bargaining unit employees within its jurisdiction. The Respondent contended that the disclosure of home addresses would violate the Privacy Act,[1] but it offered to provide the Union with the names and work addresses of all the unit employees represented by AFGE Local 3369.

III. Administrative Law Judge's Decision

The Judge concluded that the General Counsel had not established that the Respondent failed to comply with section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) of the Statute, as alleged, when it refused to give the Union the home addresses of unit employees. In reaching that conclusion, the Judge found that the strong privacy interest of employees in their home addresses outweighed the interest of their exclusive representative in disclosure of the information. The Judge also found that with the work addresses of the unit employees the Union had been provided with an adequate and reasonable alternative means of communicating with those employees.

IV. Positions of the Parties[2]

The Union's position was set forth in its exceptions. The Union contends that the Judge misinterpreted the parties' stipulations and that sending union mail to

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[1] Privacy Act of 1974, 5 U.S.C. § 552a (1982).

[2] When the Authority decided, for reasons discussed more fully in FHAFO, to review the entire issue of the release of

(Continued)

employees at their work addresses is not a reasonable alternative means of communication. The Respondent did not file a response to the exceptions.

V. Analysis and Conclusion

As noted above, in our decision on remand in FHAFO we concluded that the release of home addresses of bargaining unit employees to the exclusive representatives of those employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114(b)(4). We also determined that agencies are required to furnish such information without regard to whether alternative means of communication are available. Based on our decision on remand in the FHAFO case, we find that the Respondent in this case was required to furnish the Union with the home addresses of the unit employees sought herein. Thus, we conclude that the Respondent's refusal to furnish the requested information in this case constituted a violation of section 7116(a)(1), (5), and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Department of Health and Human Services, Social Security Administration and the Social Security Administration Field Operations, New York Region, shall:

(Continued)

employees' names and home addresses and invited agencies, unions, and interested persons to submit amicus briefs addressing the issue, this case was one of those listed as being under consideration. The Union and the Respondent filed amicus briefs in response to the Authority's invitation. The Union contends that the Respondent's submission should not be accepted because it was filed one day late. The Authority accepted and considered some amicus submissions that were received shortly after the date set in the Authority's Federal Register notice, including the Respondent's amicus brief. We note that there is nothing in the disputed submission that would alter our decision in this matter.

1. Cease and desist from:

(a) Refusing to furnish, upon request by the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, and its agent, American Federation of Government Employees, Local 3369, AFL-CIO, the names and home addresses of all New York Regional District and Branch Office employees in the bargaining unit represented by AFGE Local 3369.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, and its agent, American Federation of Government Employees, Local 3369, AFL-CIO, furnish them with the names and home addresses of all New York Regional District and Branch Office employees in the bargaining unit represented by AFGE Local 3369.

(b) Post at all its New York Regional District and Branch Office facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 3369, AFL-CIO, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, New York Region, Social Security Administration, Department of Health and Human Services, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., December 18, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request by the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, and its agent, American Federation of Government Employees, Local 3369, AFL-CIO, the names and home addresses of all New York Regional District and Branch Office employees in the bargaining unit represented by AFGE Local 3369.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, and its agent, American Federation of Government Employees, Local 3369, AFL-CIO, furnish them with the names and home addresses of all New York Regional District and Branch Office employees in the bargaining unit represented by AFGE Local 3369.

____
(Activity)

Dated:__________ By:____________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 3700, New York, N.Y. 10278 and whose telephone number is: (212) 264-4934.

(24 FLRA No. 62)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION AND SOCIAL SECURITY
ADMINISTRATION FIELD OPERATIONS,
NEW YORK REGION

Respondent

and — Case No.: 2-CA-50222

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party/Union

. . . .

Irving L. Becker and
Melvin Steverman,
For the Respondent

Charles Fahlikman,
For the Charging Party

E. A. Jones and
Susan M. Roche,
For the General Counsel
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 *et seq.* (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 *et seq.*

Pursuant to a charge of an unfair labor practice filed on March 26, 1985, the Regional Director, Region II, of the Federal Labor Relations Authority (Authority) investigated and, on May 29, served the complaint initiating this proceeding.

The complaint alleges that Respondent violated Sections 7116(a)(1), (5) and (8) of the Statute,[1] by refusing to provide the Charging Party with the names and home addresses of bargaining-unit employees within the jurisdiction of Local 3369 of the American Federation of Government Employees (AFGE).

On July 16, 1985, in New York City, a hearing was held at which the parties appeared, submitted a stipulation of facts with exhibits (hereinafter referred to as Jt. Exh. 1), and presented a short presentation of their legal positions. The General Counsel also submitted a proposed order and notice for entry in this case. Briefs were filed by the Respondent on August 7 and by the General Counsel on August 15. Based upon the stipulated facts and the briefs, I enter the following findings of fact and conclusions of law.

Findings of Fact

1. The charge herein was filed by the Charging Party on March 26, 1985, and a copy thereof was served upon the Respondent by certified mail on March 27, 1985.

2. The General Counsel of the Authority, by the Regional Director of Region II, acting pursuant to Section 7104(f)(2) of the Statute, and 5 CFR 2423.9a(4) issued a Complaint and Notice of Hearing dated May 29, 1985. Respondent, on June 19, 1985, served an Answer to the Complaint on the Union and the Regional Director.

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[1] Section 7116 provides, in pertinent part, that:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -

> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . .
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . . [or]
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

3. At all times material herein, the Charging Party has been, and is now, a labor organization within the meaning of Section 7103(a)(4) of the Statute.

4(a). At all times material herein, Department of Health and Human Services, Social Security Administration (SSA) has been, and is now, an agency within the meaning of Section 7103(a)(3) of the Statute.

(b). At all times material herein, SSA's Field Operations component, New York Region, has been, and is now, a constituent entity within the Department of Health and Human Services, SSA, and an agent acting on its behalf.

5(a). At all times material herein, Alex Bussey occupied the position of Assistant Regional Commissioner, at SSA's Field Operations, New York Region.

(b). At all times material herein, Peter DiSturco has occupied the position of Regional Commissioner at SSA, New York Region.

6. At all times material herein, the individuals named above in paragraph 5, have been, and are now, supervisors or management officials as defined in Section 7103(a)(10) and (11), respectively, of the Statute and have been, and are now, agents of Respondent acting on its behalf.

7(a). At all times material herein, the Charging Party has been, and is now, the certified exclusive representative of a consolidated nationwide unit of certain employees of Respondent, including all employees in the District and Branch Offices of SSA in the States of New York and New Jersey, excluding all management personnel, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors.

(b). At all times material herein, the Charging Party has delegated to the National Council of SSA Field Operations Locals (Council) authority to act as its representative for purposes of collective bargaining for certain of Respondent's employees, and the Council's delegation has been recognized by Respondent.

(c). At all times material herein, American Federation of Government Employees, Local 3369, AFL-CIO (AFGE Local 3369), has acted as agent for the Council for the purposes of collective bargaining for certain of Respondent's employees in the New York Region, and AFGE Local 3369's delegation has been recognized by Respondent.

8. AFGE Local 3369's delegated representational jurisdiction covers Areas I, II, III and IX within Respondent's New York Region. There are therein approximately 2400 bargaining unit employees represented by AFGE

Local 3369, who work in 52 of Respondent's New York Region district offices and branch offices. The size of the district offices and branch offices within AFGE Local 3369's jurisdiction range from approximately 8 employees to approximately 110 employees.

9. On December 21, 1984, John Riordan, President, AFGE Local 3369, requested in a letter to Mr. DiSturco the names and home addresses for all bargaining unit employees within the jurisdiction of AFGE Local 3369. This information was requested in order to communicate with and learn the views of bargaining unit employees so that bargaining conducted by AFGE Local 3369 will reflect the views of the unit employees. The information was also requested to monitor compliance with the parties' collective bargaining agreement.

10. On January 21, 1985, Mr. Bussey wrote a letter to Mr. Riordan. In paragraph 4 of his letter Mr. Bussey responded to Mr. Riordan's December 21, 1984, request by stating that the unit employees' names and home addresses were not releasable because this would unduly invade the privacy of the employees. Mr. Bussey referred Mr. Riordan to Federal litigation in which another AFGE Local was denied a similar request for information. In the alternative Mr. Bussey offered to provide the employees' work addresses to Mr. Riordan.

11. On February 1, 1985, Mr. Riordan wrote a letter to Mr. Bussey. In paragraph 3 Mr. Riordan stated that he did want employees' office addresses included in the information requested. In paragraphs 4 and 5 of the letter Mr. Riordan reiterated his reasons for requesting the information, as stated above in finding 9. Mr. Riordan stated that the information requested was clearly releasable and referred Mr. Bussey to another unfair labor practice case, Case No. 2-CA-30643, in which an Authority Administrative Law Judge ordered the respondent to provide employees' names and home addresses to the charging party in that case. He also informed Mr. Bussey that his reference to Federal litigation by another AFGE Local involved a Freedom of Information Act (FOIA) request rather than a request made pursuant to Section 7114(b)(4) of the Statute.

12. On March 15, 1985 Mr. Bussey wrote Mr. Riordan. Mr. Bussey summarized his January 21 letter to Mr. Riordan and also explained that subsequent to that correspondence the Respondent received a request for a legal opinion regarding the relationship between the Privacy Act, 5 USC 552a, and the release of information under Section 7114(b)(4) of the Statute. Mr. Bussey stated that the reason for the request of a legal opinion was that Respondent's line managers were concerned that they may incur legal liability if employees perceived that their rights under the Privacy Act had been violated by the release of unauthorized personal information. Mr. Bussey stated that a decision on the release of information pursuant to Mr. Riordan's December 21 request would be deferred until the Respondent's legal opinion was issued. Mr. Bussey also responded to Mr. Riordan's reference to the Administrative Law Judge

decision in Case No. 2-CA-30643 by stating that since the decision had been appealed, the Respondent would continue to maintain, until there is a decision on that appeal, that the release of employees' names and home addresses would unduly invade the privacy of the employees. Mr. Bussey also explained his view that Respondent's MIS data does not include home address information so that it would be extremely burdensome and costly to gather this information. The abbreviation "MIS" in paragraphs 7 and 8 of Bussey's letter refers to the Respondent's "management information system" which is comprised of personnel and personal data on Respondent's employees and clientele. Enclosed with Mr. Bussey's correspondence was the name of the office in which every unit employee was working. This then allowed Mr. Riordan to identify the work location of every unit employee since the Union already possessed the addresses of the offices.

13. The Charging Party and Respondent are parties to a collective bargaining agreement covering the nationwide bargaining unit described in finding 7 above.

14(a). The information requested in the December 21, 1984, request is maintained on each employee's Standard Form 7B card and on each employee's payroll check stub. The 7B cards are maintained in each employee's 7B Extension File which is located at the district office or branch office in which the employee is employed. A list of the names and home addresses could be prepared by a clerical employee in each office writing each employee's name and address as it appears on the 7B card. It is estimated that it would take no more than one minute to write the name and address for each employee. An Administrative Assistant maintains a copy of each employee's payroll check stub in the district or branch office in which they are employed. A list of the employees' names and home addresses could be developed from the Administrative Assistant photocopying all pay stubs, while sanitizing by covering all information except the employee's name and home address. It is estimated that it would take no more than one and one-half minutes to photocopy the name and address from each employee's payroll check stub.

(b). The information requested in the December 21 request is normally maintained by Respondent in the regular course of business and does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining.

15. The Charging Party requested the names and home addresses of bargaining unit employees within the jurisdiction of AFGE Local 3369 in order to communicate with and learn the views of the employees so that bargaining by AFGE Local 3369 will reflect the views of unit employees on such issues as computerization of offices; office openings, closings and relocations; continuous performance audits of employees; use of medical release forms; changes in front-end client interviewing procedures; and employees' counseling services. Employees views may pertain to the impact and implementation of Respondent initiated on-going and future changes

involving these and other issues relating to bargaining unit working conditions with regard to which the Charging Party has an obligation to fairly represent its bargaining unit members. The information was also requested to monitor compliance with the parties' collective bargaining agreement referred to in finding 13 above. Issues involving contract compliance on which the Charging Party may wish to communicate with and obtain the views of unit employees may include: performance audits under Article 21; health and safety under Article 13; maternity leave under Article 31; and part-time employment under Article 33. Prior to the formulation of the parties' stipulation of facts, the Respondent was never specifically and expressly informed by the Charging Party that the above examples constituted the reason for the request for unit employees' name and home addresses.

16. The Charging Party has the names and home addresses for all employees who are members of AFGE Local 3369 who wrote their home address on the Form 1187 when they made application to join the Union. However, some Union members used their office address on the Form 1187 and others have changed their addresses without notifying the Union. About 45 percent of the bargaining unit employees within the jurisdiction of AFGE Local 3369 are members of the Union. Other than the above data in its own files, the information sought by the Charging Party in the December 21, 1984, request was not available to the Charging Party from any other source. The Charging Party did not have any reasonable alternative means of communication with its bargaining unit members. Neither Respondent nor the Charging Party raised or addressed the issue of reasonable alternative means of communication prior to the formulation of the parties' stipulation of facts.

17. On or about January 21, 1985, and at all times thereafter including March 15, 1985, Respondent, through Mr. Bussey, failed and refused to furnish to the Charging Party the requested information described in finding 9 above.

(a). The basis for the refusal was first stated in Mr. Bussey's letter to Mr. Riordan dated January 21, 1985. In this letter, Mr. Bussey stated, in pertinent part, that:

> Your second letter dated December 21, 1984 requests names and addresses of all bargaining unit members under the jurisdiction of Local 3369. If you are requesting home addresses, this information is not releasable under the authority cited in your request as it would unduly invade the privacy of employees. In this regard, AFGE Local 1923 unsuccessfully sought similar information in Federal litigation in 1983. If you intended to request work addresses, as stated in the second paragraph of this letter, that information could be furnished.

See Exhibit 3 to the parties Stipulation of Facts, which is Joint Exhibit 1 (Jt. Exh. 1).

(b). The basis was again stated in Mr. Bussey's letter to Mr. Riordan of March 15, 1985. In this letter, Mr. Bussey stated, in pertinent part, that:

> Subsequent to January 21, 1985, this office received a request for a legal opinion regarding the relationship between the Privacy Act and the release of information under 5 USC 7114(b)(4). A part of the reason for the requested clarification was the concern by line managers of legal liability in the event an employee perceived that his/her rights under the Privacy Act had been violated if personal information is released without their authorization. Since union officials have often expressed their concerns about potential liability in duty to fair representation situations, we are sure you can appreciate line management's concerns about their potential liability under the Privacy Act.
>
> While we are fully aware of emerging case law regarding 7114 requests, we believe all interests would be served by obtaining a legal opinion regarding the relationship of the two laws. Therefore, we have submitted this question for review and response. . . .
>
> Regarding your continued request for home addresses, you advise this information is clearly releasable based on FLRA Case No. 2-CA-30643. The case to which you refer, involving the Northeastern Program Service Center, has been appealed. Until there is a decision regarding that appeal, the Social Security Administration believes that release of such information would unduly invade the privacy of employees. In addition, our MIS data does not include home address information, therefore it would be extremely burdensome and costly to gather this information. Since the attached listings identify the duty locations of bargaining unit members within Local 3369's jurisdiction, such information provides the Local access to bargaining unit members.

See Exhibit 5 to Jt. Exh. 1.

18. Other than the correspondence referred to in findings 9 though 12 and 17, above, there were no other communications between Respondent and

the Charging Party regarding the Charging Party's information request of December 21, 1984.

19. No evidence was adduced as to any problems associated with bargaining-unit employees receiving personal mail at their work addresses.

Discussion and Conclusions

The Charging Party/Union in this case sought the names and home addresses of bargaining-unit under Section 7114(b)(4) of the Statute which provides that:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation - . . .
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. . . .

The parties here have stipulated that the information sought is normally maintained by Respondent in the regular course of business, and does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining. See finding 14(b), above.

It is undisputed, and clear that such information constitutes "data" within the meaning of the Statute. And Respondent does not raise an issue, in its brief, as to the information being "readily available." Based upon finding 14(a), I conclude that it was, indeed, readily available.

Since the complaint in this case was filed, the Authority has issued a line of decisions setting forth its approach to deciding cases wherein unions request management to furnish them with the names and home addresses of bargaining-unit employees. See Farmers Home Administration Finance Office, St. Louis, Missouri, 19 FLRA No. 21, 19 FLRA 195 (July 22, 1985, hereinafter Farmers), petition for review filed sub nom. American Federation of Government Employees, AFL-CIO, Local 3354 v. FLRA, No. 85-1493 (D.C. Cir., August 6, 1985); Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 19 FLRA No. 85, 19 FLRA 675 (August 12, 1985, hereinafter, Defense Mapping); Philadelphia Naval Shipyard, 19 FLRA No. 107, 19 FLRA 899, (August 22, 1985); Social Security Administration Northeastern Program Service Center, 19 FLRA No. 108, 19 FLRA 913 (August 22, 1985, hereinafter SSA NEPSC); and Department of Defense, Department of the Navy, Norfolk Naval Shipyard, Norfolk, Virginia, 20 FLRA No. 44 (September 30, 1985, hereinafter Norfolk Naval Shipyard).

In each of these cases the Authority has dismissed the complaints on the ground that the Privacy Act of 1974, Pub. L. No. 83-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (1982)) prohibited the disclosure by law. In each of these cases, the Authority first performed "a balancing test," which weighs the necessity of the data for the union's purposes against the degree of intrusion on the individuals' privacy interests caused by the disclosure of the data. See, e.g. SSA NEPSC, 19 FLRA at 915. In each of these cases, the Authority has noted the "employees' strong privacy interest in their home addresses." See, e.g. SSA NEPSC, ibid. And, in each, the Authority has noted that the Union had alternative means of communicating with the unit employees.

In this case it has been stipulated that the Union did not have any reasonable alternative means of communication with the bargaining unit employees. See finding 16, above. I interpret this stipulation to mean that the Union lacked any reasonable alternative means as of the date it made its December 21, 1984 request for the names and home addresses of unit employees. However, after the Union made its request, Respondent, on January 21, 1985, offered to give to the Union the names and work addresses of unit employees. See finding 10, above. And, on March 15, 1985 Respondent gave the Union this information. See finding 12, above. No evidence was offered of any problems connected with employees receiving personal mail at their work addresses. While receiving mail at home may be more desirable, from the Union's viewpoint, I cannot conclude, on this record, that receipt of personal mail at the office does not provide the Union with an adequate and reasonable means of communicating with all the employees it represents. Under the line of Authority decisions cited above, I am constrained to hold that what the Authority perceives to be the strong privacy interest of employees in their home addresses, even vis-a-vis their exclusive representative, tips the scales in favor of nondisclosure, in this particular case.

In view of this conclusion, other issues raised by the parties need not be resolved.

Ultimate Findings and Recommended Order

The General counsel has not established, by the preponderance of the evidence,[2] that Respondent has committed the unfair labor practices alleged in the complaint.

Accordingly, the complaint in this case should be, and it hereby is DISMISSED.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: November 5, 1985
Washington, DC

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[2] This is the statutory burden of proof. See 5 U.S.C. 7118 (7) and (8).

24 FLRA No. 63

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Respondent

and

Case No. 2-CA-50188

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent (Agency). The General Counsel filed an opposition to the exceptions. The issue is whether it is an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent (Agency) to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Charging Party (Union) with the names and home addresses of employees of the Respondent's Office of Assessment (Field) (FAO) who are included in a national exclusive unit represented by the Union.

In a recent Decision and Order on Remand, *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 FLRA No. 101 (1986) (*FHAFO*), we reviewed the Authority's previous decision concerning the release of the names and home addresses of bargaining unit employees to exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that the release of the information is generally required without regard to whether alternative means of communication are available. Consistent with our decision on remand in *FHAFO*, we conclude that the Respondent's refusal to provide the Union with the home addresses of bargaining unit employees sought in this case violated section 7116(a)(1), (5) and (8) of the Statute.

II. Facts

The Union is the exclusive representative for many of the Respondent's employees, who are grouped in various nationwide bargaining units. The Union requested the names and home addresses of all of the bargaining unit employees who are represented by the Union's FAO Council. The FAO Council acts as an agent for the Union in representing FAO employees. The request was made during the course of midterm negotiations between FAO and the AFGE FAO Council concerning the impact and implementation of a proposed realignment of the FAOs. The Respondent denied the request on the grounds that it would be "virtually impossible" for it to furnish the information within the time provided for negotiations, that the information was not relevant or necessary to the outcome of the negotiations, and that the request was an impediment to good faith bargaining.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent failed to comply with the requirements of section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) when it refused to provide the Union, upon request, with the names and home addresses of the unit employees which it had sought. In reaching that conclusion, the Judge found that disclosure of the names and home addresses of the unit employees to the Union was not prohibited by law, that the information was reasonably available, and that the information was necessary in order for the Union to effectively communicate with and represent all the employees in the unit.

IV. Positions of the Parties

The parties' positions were set forth in the Respondent's exceptions and the General Counsel's opposition.*/

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*/ When the Authority decided, for reasons discussed more fully in FHAFO, to review the entire issue of the release of employees' names and home addresses and invited agencies, unions, and interested persons to submit amicus briefs addressing the issue, this case was one of those listed as being under consideration. The Union and the Respondent filed amicus briefs in response to the Authority's invitation. The Union contends that the Respondent's submission should not be accepted because it was filed one day late. The Authority accepted and considered some amicus submissions that were received shortly after the date set in the Authority's Federal Register notice, including the Respondent's amicus brief. However, we note that there is nothing in the disputed submission that would alter our decision in this matter.

In its exceptions, the Respondent essentially disagrees with the Judge's findings and conclusions and asserts that it was not obligated to furnish the requested information to the Union. In its opposition, the General Counsel argues that the Judge's findings and conclusions are supported by a preponderance of the evidence and are consistent with law. The General Counsel therefore urges the Authority to adopt the Judge's decision in its entirety.

V. Analysis and Conclusion

As noted above, in our decision on remand in FHAFO we concluded that the release of home addresses of bargaining unit employees to the exclusive representatives of those employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114(b)(4). We also determined that agencies are required to furnish such information without regard to whether alternative means of communication are available. Based on our decision on remand in the FHAFO case and in agreement with the Judge in this case, we find that the Respondent was required to furnish the Union with the names and home addresses of the unit employees sought herein. Thus, we conclude that the Respondent's refusal to furnish the requested information in this case was in violation of section 7116(a)(1), (5), and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Department of Health and Human Services, Social Security Administration, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request by the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, and its agent, the National Council of SSA Field Assessment Locals, the names and home addresses of all Field Assessment Office employees in the bargaining unit represented by the National Council of SSA Field Assessment Locals.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, and its agent, the National Council of SSA Field Assessment Locals, furnish them with the names and home addresses of all Field Assessment Office employees in the bargaining unit represented by the National Council of SSA Field Assessment Locals.

(b) Post at all its Field Assessment Office facilities where bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, National Council of SSA Field Assessment Locals are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Deputy Commissioner for Assessment and Management, Social Security Administration, Department of Health and Human Services, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., December 18, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request by the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, and its agent, the National Council of SSA Field Assessment Locals, the names and home addresses of all Field Assessment Office employees in the bargaining unit represented by the National Council of SSA Field Assessment Locals.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, and its agent, the National Council of SSA Field Assessment Locals, furnish them with the names and home addresses of all Field Assessment Office employees in the bargaining unit represented by the National Council of SSA Field Assessment Locals.

____
(Activity)

Dated:__________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 3700, New York, N.Y. 10278 and whose telephone number is: (212) 264-4934.

(24 FLRA No. 63)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION

Respondent

and

Case No. 2-CA-50188

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party/Union

. . . .

Irving L. Becker,
For the Respondent

Barry Nelson,
For the Charging Party/Union

Joel Hornstein and
E. A. Jones,
For the General Counsel,
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. § 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Pursuant to a charge filed by the Union on March 8, 1985 and amended on April 25, the Regional Director of Region II, Federal Labor Relations Authority (hereinafter, Authority), investigated and, on May 29, 1985 served the complaint initiating this proceeding.

The complaint alleges that Respondent (also referred to hereinafter as SSA) violated Section 7116(a)(1), (5) and (8) of the Statute by refusing to provide the Union with the names and home addresses of bargaining unit employees and, thereby, to comply with Section 7114(b)(4) of the Statute.[1]

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[1] These statutory provisions are as follows:

Section 7114(b) provides that:

> The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation - . . .
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -
>
> > (A) which is normally maintained by the agency in the regular course of business;
> >
> > (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
> >
> > (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . . .

Section 7116 provides, in pertinent part, that:

> (a) For the purposes of this chapter, it shall be an unfair labor practice for an agency --
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . .
> >
> > (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter . . . or
> >
> > (8) to otherwise fail or refuse to comply with any provision of this chapter.

Respondent denies that it has committed any violations of the Statute.

On July 15, 1985, in New York City a hearing was held at which the parties appeared, adduced documentary evidence, and examined witnesses. Briefs were filed by Respondent, on August 28, and by the General Counsel, on September 3, pursuant to an order dated August 2, which extended the briefing time until September 3, for good cause shown.

On September 4, 1985, Respondent filed a Motion for Summary Judgment To Dismiss based upon three recent Authority decisions -- Farmers Home Administration Finance Office, St. Louis, Missouri, 19 FLRA No. 21, 19 FLRA 195 (July 22, 1985), Defense Mapping Agency, Aerospace Center, St. Louis, Missouri, 19 FLRA No. 85, 19 FLRA 675 (August 12, 1985); and Social Security Administration, Northeastern Program Service Center, 19 FLRA No. 108, 19 FLRA 913 (August 22, 1985). Respondent alleges that all of the legal issues in this case are resolved in the cited cases, which present essentially identical factual situations. The General Counsel and the Charging Party/Union filed their separate oppositions to the motion on September 16. Since there are some disputed issues of fact which bear upon the issues to be decided herein, it is inappropriate to decide this case upon a motion for summary judgment. Accordingly, it is denied.

Based upon the record made in this case, my observation of the demeanor of the witnesses, and the briefs, I enter the following findings of fact and conclusions of law and recommend the entry of the following order.

Findings of Fact [2]

1. At all times material herein, the Charging Party/Union has been, and is now, a labor organization within the meaning of Section 7103(a)(4) of the Statute.

2. At all times material herein, Respondent SSA has been, and is now, an agency within the meaning of Section 7103(a)(3) of the Statute.

3. At all times material herein, the following named persons occupied the positions set forth below, opposite their names:

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[2] The following abbreviations will be used. "TR." refers to the transcript. "G.C. Exh." refers to the exhibits of the General Counsel, "R. Exh." to those the Respondent, and "Jt. Exh." to the Joint Exhibit. "G.C. BR." refers to the brief of the General Counsel and "R. BR." to that of Respondent. Corrections to the transcript are appended hereto, and are made pursuant to 5 CFR 2423.19(r) and the unopposed motion of the General Counsel, which is granted, with a few corrections and exceptions as shown in the appendix.

Richard Matthews - Labor Relations Advisor, Social Security
Administration, Baltimore, Maryland; and

Vivian Bromley - Labor Relations Specialist, Social Security
Security Administration, New York, New York.

4. At all times material herein, the individuals named above have been, and are now, supervisors or management officials as defined in Section 7103(a)(10) and (11), respectively, of the Statute and have been, and are now, agents of Respondent acting on its behalf.

5.(a) At all times material herein, the Charging Party/Union has been, and is now, the certified exclusive representative of a consolidated nationwide unit of certain employees of Respondent, including all employees employed in the various offices of the Respondent's Office of Assessment (Field), hereinafter FAO, excluding all management personnel, professional employees, federal employees engaged in personnel work in other than a purely clerical capacity, guards and supervisors.

(b) On July 11, 1982, SSA and the Charging Party/Union signed a National Agreement.

(c) At all times material herein, the Charging Party/Union has delegated to the National Council of Field Assessment Locals (FAO Council) authority to act as its representative for the purposes of collective bargaining for certain of Respondent's employees including those employed in the various offices of the Respondent's FAO. The FAO Council's delegation has been recognized by Respondent.

6. The size of the bargaining unit is unclear. It was estimated as being not more than 500 by FAO Council representatives (TR. 15, 21, 52, 56 and 129). Their uncertainty as to the size of the unit they represent may be attributed to the fact that there is no contractual requirement that Respondent furnish the Council, periodically, with the names of those in the unit. See Jt. Exh. 1. Respondent's senior labor relations specialist dealing with the FAO component, Mr. Matthews, estimated that there are at least 1000 in the unit, less about 100 supervisors. See TR. 209. Mr. Matthews seemed quite positive of his estimate and is in a better position to know these facts than the Council representatives. Accordingly, I credit his estimate of about 900 as being closest to the mark. The unit is a nationwide one, with members located in 10 regions and "roughly 40" satellite offices (TR. 54). The unit is composed mostly of analysts, some of whom travel on a regular basis.

7. By letter dated November 23, 1984, Respondent notified the FAO Council of a proposed realignment of the FAO. The realignment would eliminate positions in each of the 10 FAO regions and affect four to five staffs in each region. It would change the structure of the FAO by eliminating two branches and combining their positions into new branches

along program, rather than job lines. Satellite offices would remain internally unchanged. About 90 employees would have their jobs abolished and might need retraining. Under the proposed realignment, it appeared that several of the regions' employees, in order to keep their jobs, would be subject to relocations, either from one building to another, as in the Chicago region; from one city to another, as in the San Francisco region; from one State to another, as in the Atlanta region; and from Manhattan to Queens in the New York City area.[3] The realignment created four new bargaining-unit jobs and affected, either directly or indirectly, approximately 300-400 unit employees. The realignment did "not alter any FAO responsibilities or workloads." See paragraph 4 on page 2 of G.C. Exh. 2.

8. By letter dated December 3, 1984, the FAO Council, inter alia, asked certain questions about the proposed realignment, demanded bargaining, and designated Barry Nelson as its chief negotiator. Mr. Nelson holds various positions on the Council, including that of Executive Vice President.

9. By letter dated December 6, 1984, the FAO Council, pursuant to Section 7114(b)(4) of the Statute, made a request for information which included the following:

> Name, home address, type of appointment, organization/office/branch, work schedule, position number, position title, grade and region for each bargaining unit position in the Office of Assessment (field) as of October 1, 1983 and April 30, 1984 . . . .

See G.C. Exh. 4. The letter stated that the information requested would "assist [the FAO Council] in responding to [Respondent's] proposal to reorganize the [FAO] dated November 23, 1984." See G.C. Exh. 4.

10. By letter dated January 3, 1985, Respondent responded to both the letters of the FAO Council (see findings 8 and 9, above). Inter alia, Respondent's letter stated that:

> We fail to understand the relevancy of the requested information in relation to this realignment. In addition, based on existing guidance from the Office of Personnel Management, we are not able to provide you with the names and home addresses of bargaining unit employees (OALJ-83-85).

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[3] The Council's chief negotiator so testified. See TR. 131, 141 and 138. Mr. Matthews, testified that "[b]asically nobody was going to move" (TR. 237). However, it is undisputed that the memorandum of agreement negotiated provided for relocation allowances for employees reassigned outside their commuting area. See G.C. Exh. 13, page 3, para. 6. So some relocations must have been expected. Accordingly, I credit the testimony of the Council's witness.

See G.C. Exh. 5, page 2. "OALJ-83-85" is a reference to Defense Mapping Agency Aerospace Center, St. Louis, Missouri, Case No. 7-CA-20482, in which the Authority has subsequently ruled that the Privacy Act foreclosed the disclosure to a union of home addresses of its bargaining-unit members by the agency, under the particular facts of that case. See 19 FLRA No. 85 (August 12, 1985).

11. In January 1985, the FAO Council filed an unfair labor practice charge based upon the negative response of Respondent to the request for information made on December 6, 1984 (see findings 9 and 10, above). The charge was subsequently withdrawn, on or about February 19, 1985, based on the advice of an Authority agent that the request was too broad, in that it sought the information for 1983 and 1984, and that a less broad request should be made.

12.(a) In the meanwhile, the negotiations demanded by the FAO Council in December 1984, were taking place in New York City. Karen Reynolds substituted for Barry Nelson as the chief negotiator for the union. Stanley Kroman and Shraga Rice were the other members of the union negotiation team. The management team consisted of Vivian Bromley, as chief negotiator, Richard Matthews, and William Foreman. A one-day briefing, on Tuesday, February 12, 1985, preceded the negotiations which began on Wednesday, February 13.

(b) The parties signed off on ground rules on February 12, 1985, the day of the briefing. Deleted, without prejudice, was the following:

> It is understood by the parties that the standards of 5 USC 7114(b)(4) will apply with respects to the Administration providing the Union with copies of all necessary and relevant information concerning negotiations of this issue.

See R. Exh.1, page 2, paragraph C. The Union "felt that, to some degree, we already by statute had the protection for information request and there was no need to have it in there" (TR. 183). During the negotiations of the ground rules, the Union made no requests for the names and home addresses of unit employees. Ms. Bromley conceded that, in other negotiations in which she had participated, the union had not made information requests during ground rules negotiations. At the time the negotiations began, the Union's information request for the names, offices and home addresses of unit employees was the subject of the outstanding unfair labor practice charge described in finding 11, above.

13. On Wednesday, February 13, 1985, bargaining began. The parties spent the better part of this day clarifying the leave status of the Union's chief negotiator and determining whether she would receive official time for the negotiations.

14. The period of Thursday through Friday, February 14 and 15, 1985, was spent by the parties on housekeeping details and non-controversial aspects of negotiation of items that go into a memorandum of understanding (MOU), including posting of a copy of the MOU and its becoming effective upon signature.

15. The period of February 16-17, 1985, was a weekend and Monday, February 18 was a holiday. On or about February 19, and as already found, the Union determined to withdraw its charge of an unfair labor practice based upon Respondent's refusal of January 3 to furnish the names, office locations and home addresses of unit employees and to file a narrower request, that is for a more limited period of time. See finding 11, above. In a memorandum dated February 19, the chief negotiator for the FAO Council gave a written request for information to Respondent's chief negotiator. The request reads as follows:

> Pursuant to 5 USC 7114(b)(4), this constitutes our request for relevant and necessary information in order to continue to formulate proposals and to otherwise carry out our representational functions. We are hereby requesting that you provide us with the names and home addresses of employees represented by the FAO Council as of this date. Please provide this information as soon as possible.

See G.C. Exh. 6. This request was given to Respondent's chief negotiator on the afternoon of February 19 or the morning of February 20. See TR. 164, 205, 206 and 247. No one on the Council's negotiating team orally amplified upon the need for the information. Respondent's negotiators looked at the request and indicated that the Council would not get the information. See TR. 165 and 270. Although the written request stated the need for the information, Respondent's negotiators asked the Union's chief negotiator why she needed it, to which question the Council's chief negotiator replied merely that she had been told to request the information and asked for a written reply.[4] Respondent's negotiators told the Council's chief negotiator that "it would be virtually impossible" for Respondent to furnish the information sought (TR. 228-229), apparently meaning within the period set for bargaining by the parties' contract, which is 10 working days, but can be extended by mutual consent of the parties. See Jt. Exh. 1, pages 7 and 8.

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[4] Ms. Reynolds could not recollect this. See TR. 271-277 and 280. However, Ms. Bromley and Mr. Matthews both so testified and appeared positive and truthful. See TR. 206-208, 217-218, 235, and 279-280. I credit their testimony on this point.

16. By memorandum dated February 20, 1985, Respondent's chief negotiator wrote to the Union's chief negotiator as follows:

> This is in reply to your information request of February 19, 1985 regarding your being provided the names and home addresses of employees represented by the Field Assessment Office Council.
>
> At this point in the negotiation process I do not find your request to be relevant or necessary to the outcome of these negotiations. The fact is that we have already had four days of negotiations during which we have exchanged information and poroposals [sic.] concerning the implementation and impact of placement procedures to be utilized for placement of employees under the FAO realignment.
>
> Nothing in either the union's nor management's proposals for procedures to place employees is dependent on the union having the names and home addresses of these employees. All proposals properly address the situation from a national prospective, ie. placing the employees based on positions and current component.
>
> Your February 20, 1985 request for the number of positions to be filled in the realignned [sic.] FAO components is a duplicate of your request of January 10, 1985. Management responded to this request January 28, 1985.
>
> Your requests, in my view represents an impediment to good faith bargaining and I am not furnishing the requested information.

See G.C. Exh. 13. The FAO Council has never received the requested information.

17. At the hearing, the FAO Council's need for the names and home addresses was stated to be as follows:

a. They would assist the FAO Council in formulating proposals and to carry out its representational functions, as stated in the written request (see finding 15 above) and "to be able to adequately represent bargaining unit members in terms of the issues that were at the table" (TR. 135).

b. The FAO Council wanted to be able to identify the training needs of unit employees. As a result of the realignment, as many as 90 employees would be reassigned to new positions that would have duties different from their area of past work experience. The Council wanted to contact employees prior to the realignment to ascertain their work experience, so it could have some idea of the amount of training that would be needed and, after the realignment, to determine whether the employees received adequate training.

c. The Council believed that certain employees would have to relocate as a result of the realignment and change commuting and carpool arrangements. See finding 7, above. The Council wanted to get feedback concerning such a change in their working conditions.

d. The FAO Council wanted to contact employees to ascertain how many would be eligible for discontinued service retirement, which permits an employee whose position has been abolished to retire earlier than he or she would have under regular civil service retirement rules. A union concern during negotiations was the question of whether it would want to incorporate into its proposals something to encourage employees to take advantage of this, and thus limit the number of employees impacted by the realignment.

e. The FAO Council wanted to determine how many employees would be eligible for the hardship exception to automatic reassignment. This exception permits employees, subject to automatic reassignment under the realignment, to request an exemption. Also, the negotiating team of the Council had some idea of the impact the reassignment would have on the employees in the New York area where the negotiations were being conducted; but it was not sure of the impact on employees in the other nine regions. Some of the unit employees might look forward to the change; but the FAO Council had no idea whether this was so or not.

f. Shortly after the negotiations over the realignment began, Respondent notified the FAO Council that it intended to close certain satellite offices in 1985. The Council knew that it would want to bargain over these office closings. The negotiations over the office closings followed soon after the conclusion of the negotiations over the realignment. It would have been helpful to the Council, in representing the employees affected by the office closings, to have been able to contact them through their home addresses. The Council's negotiating team never advised the Respondent that this was a reason it wanted the information.

g. Finally, the Council wanted the names and home addresses of unit employees in order to police the MOU. Apparently, the Council never explicitly advised Respondent that it wanted the information for this reason. See TR. 109-111 and 221.

h. Although the negotiations over the realignment of the FAO have been concluded, the FAO Council still wants the names and home addresses of unit employees for the following reasons. The information would enable the Council to ascertain whether employees received training as provided for in the MOU and whether there were any ongoing problems associated with training. The parties discussed that at the bargaining table. Additionally, the Council wanted the information to get feedback from employees concerning the application of the MOU. Finally, the information will be helpful in connection with the impending negotiations concerning the closing of certain satellite offices.

18. The FAO Council did not request the names and home addresses of unit employees for the purpose of mailing out its newspaper, The Government Standard, or to expand it mailing lists.

19.(a) The negotiations over the realignment concluded on February 27, 1985 with the signing of the MOU. It included provisions on the placement of employees; hardship exceptions; 30 days written, advance notice of reassignments; furnishing copies of changed, modified, or newly developed position descriptions or performance standards to employees within 10 days of placement; training; relocation allowances for employees reassigned outside their commuting area; honoring outstanding leave requests; and posting copies of the MOU. Hardship exceptions, training, and relocation of employees were discussion topics from the outset of negotiations.

(b) The MOU also provided that management would provide the Council with a list of employee preferences (concerning placement in FAO offices) and service computation dates, and a list of planned placement for all employees made pursuant to the FAO realignment. The Council intended to use this information to police the MOU, e.g., to determine whether management had taken seniority into consideration in placing employees under the realignment. A member of the management negotiation team commented, during the negotiations, that giving this information "takes care somewhat of your names and addresses" (TR. 219 and see also TR. 220 and 232). But the Council never agreed that this information was to take the place of the names and home addresses sought.

20. Respondent has access to the names and home addresses of unit employees in several documents.

a. The first is the Employee Record Card, Standard Form 7-B. The Employee Record Card contains such information as the employee's name, home address, telephone number and emergency address. Employees are supposed to fill out this card when they go on duty or to a new office, and to notify the timekeeper, administrative aide, or manager if their address changes. The immediate supervisor of each employee maintains Standard Form 7-B in the employees' SF-7B file within each FAO office. The SF-7B file itself is supposed to be retained in a secure location (e.g., lockable desk or cabinet) at the immediate supervisory level.

b. Respondent also maintains the names and home addresses of unit employees on Form SSA-4033, the Employee Locator Card. The Employee Locator Card is maintained by the administrative aide or timekeeper in each office. Employees are responsible for keeping the data up to date. The SSA Administrative Directive System Guide for this document provides, inter alia, that one of the uses made of the Employee Locator Record Card is the preparation of "Special listings" for use by "the Union." See G.C. Exh. 10, page 3, paragraph VI C.

c. The names and home addresses of unit employees are also found on their payroll stubs, which are also coded with a "Union-Code" (G.C. Exh. 11). The Department of Health and Human Services (HHS) Central Payroll Office in Washington, D.C. generates the information on payroll stubs for SSA. The timekeeper or administrative aide in each office maintains a copy of the payroll stubs. Additionally, computerized payroll data is accessible via the HHS Central Payroll Office.

d. Finally, the names and home addresses of unit employees are contained in the SF 171 (Personal Qualification Statement) of each employee which is located in each employees' official personnel folder. The latter is usually maintained in the regional city office in each FAO region.

21.(a) In addition to the printed formats described in finding 20, above, Respondent has an electronic teletype system, called SSADAR, which it uses to communicate with its offices, usually on matters that must go out to the field on an expedited basis. SSADAR is not in Respondent's satellite offices or field stations. Clearance from Respondent's central office is required to activate the SSADAR system. Respondent's Deputy Commissioner for Operations could have given the necessary approval based on a telephone request.

(b) Respondent claims that using SSADAR to recover the information sought here would not be "practical" and that it would take less time just to call "everybody up on the phone" (TR. 279). The evidence was not convincing that SSADAR could not be accessed quickly, once necessary approval to access was obtained, or that approval would be difficult or time consuming to obtain.

22.(a) In order to obtain the names and home addresses of the FAO bargaining unit represented by the FAO Council, immediately after the February 19 or 20, 1985, request, Mr. Matthews believes that he would have had to go to "each individual supervisor and probably 7-B files" (TR. 209). At the time of the February 1985 request, Respondent had "maybe 100, 125 individual supervisors out there" (TR. 210 and see also TR. 211). In order to get the information, Respondent would have first had to contact the ten regional commissioners. Mr. Matthews estimated that this task could not have been completed before June or July 1985. It was not shown that Mr. Matthews made any study or analysis of the logistics involved in retrieving names and home addresses of bargaining-unit employees; or that he talked to any supervisors to determine the difficulties involved; or that he talked to anyone in the Payroll Office to determine how soon the computer could process the information; or that he talked to the management official necessary to obtain permission to use the SSADAR system. No monetary costs for retrieval were "looked at" by Respondent (TR. 214). Mr. Matthews "presume[d]" that the retrieval process itself would have been "quite burdensome" (TR. 214). This presumption is based upon too little factual bases to be given credence.

(b) Mr. Matthews considered going to HHS's Central Payroll Office for the information; but he ended up not making any request to it, because past experience has shown that it takes "an enormous amount of time," perhaps "months" to get information from this source. (TR. 216).

(c) Because the closing of offices is "a continuous thing that will probably take place over the next couple of years . . ." with "people in the closed offices moving to other regional offices in other locations," Respondent does not believe that it "could come up with a list [of names and home addresses] that would be exact in terms of saying that [it] could pinpoint everybody even today and right now" (TR. 221-222).

23. The FAO Council has the home addresses of its members, which apparently number about 150. (The Council estimated that union membership at 30 percent of a 500-size unit). See finding 6, above. The Council established the following present methods of communicating with the non-member, unit employees and difficulties therewith, where applicable.

a. The use of union officials on official time. The collective bargaining agreement provides for two national level officers, a local president or regional vice-president for each region, and a steward at each installation, plus an assistant steward at those installations with more than 100 unit employees. See Jt. Exh. 1, page 82. All these officials get a certain amount of official time to perform representation duties. Some are out of the office and in a travel status, on a regular basis, for several days out of a month, during which time they are unable to perform representational duties for the Council. Additionally, the Council has experienced difficulty in recruiting unit employees to serve as stewards because some do not believe that they can successfully combine their official and representational duties. Also, in some instances, only a few unit employees in an office belong to the Council. As a result, the Council has had to designate off-site stewards to represent unit employees in some offices. For example, the FAO office in Miami has only four unit employees and the steward for that office works in the Atlanta FAO office.

b. Distributing union literature off Respondent's property. Unit employees in the FAO offices have flextime hours; are not clearly identifiable as unit employees; work in buildings with non-unit employees; and the buildings have more than one entrance and exit. These circumstances make distribution of union literature at building entrances and exits difficult. The Council considered use of its steward system to hand out leaflets to unit employees coming to and leaving work, but decided that it was "just impractical" (TR. 114).

c. Distributing union literature on Respondent's property. Under the parties' collective bargaining agreement, the Council has the right to distribute union publications on Respondent's property. The contractual provision requires that both the Council representatives distributing the material, and the employees receiving it, be on non-duty time. In view of the flextime hours being kept, the Council representative would have to drop off the material very early or late in the working day, to assure that everyone receives it.

d. Use of Respondent's internal mail service. By contract, the Council has access to Respondent's internal mail service, but not for "mass mailings." See Jt. Exh. 1, page 22.

e. Use of bulletin boards. The Council has access to bulletin boards in all of Respondent's facilities. Since they are in public areas, management is privy to any union materials placed on them. Additionally, in the Dallas FAO office, the Council experienced one instance of difficulty in management removing union materials from a bulletin board. It led to the filing of an unfair labor practice charge which was settled.

f. Union newsletters. The Council does not have a newsletter. AFGE distributes one entitled The Government Standard. The Council can use the newsletter of locals which, except at Boston, have both unit and non-unit employees in them. However, the Council is dependent upon their publication schedules. It takes two or three weeks to prepare and publish a newsletter.

g. Use of the Federal Telecommunications System (FTS). The Council may use the FTS for the conduct of labor-management relations, under the parties' contract. However, when Council locals have tried to call 5, 10, 15 or 20 unit employees, at one time, local management has stopped the usage as being "just too disruptive" (TR. 116). During the period of the FAO negotiations over the realignment here at issue, the Council negotiators were able to contact a maximum of 27 unit employees, to obtain feedback concerning what employees knew about changes planned in their offices, how relocation might affect them, and the extent to which they might need retraining. The Council's negotiators were limited to contacting only those unit employees known to them.

h. Use of Respondent's photo copy equipment. The parties' contract allows the Council use of this equipment.

i. Use of Respondent's shuttle. The parties' contract allows union representatives to use this mode of transportation.

j. Use of the public address system. The parties' contract allows continued usage of this system at those facilities where it was so used prior to June 10, 1980.

k. Non-duty use of meeting facilities. The parties' contract allows such usage with sufficient advance notice and where available and not already committed.

l. Use of office space for confidential discussions between a bargaining unit member and a designated union representative. The parties' contract provides that Respondent will make reasonable efforts to provide such space, as available.

m. Flash bulletins. The FAO Council President once sent out "a type of flash bulletin" to bargaining unit employees, but only about half the unit employees ever saw it, because of distribution difficulties (TR. 73-75 and 84).

n. Introductions. Under the collective bargaining agreement, new employees are either introduced to their union representative or given a written statement that the name of their union representative is on the union bulletin board. In the Atlanta regional office, at least, a union representative is allowed to address new employees at orientation meetings held every two weeks.

Discussion and Conclusions

The General Counsel has established, by the preponderance of the evidence,[5] that Respondent violated Section 7114(b)(4) of the Statute when, during bargaining on a management proposal to realign the offices of unit employees, it refused to produce the names and home addresses of the Charging Party's bargaining unit on the ground that it did not find the request to be "relevant or necessary to the outcome of these negotiations." See finding 16, above.

Under Section 7114(b)(4), an agency has the duty to furnish "data" that is: (1) not prohibited by law; (2) is normally maintained by the agency in the regular course of business; (3) is reasonably available; (4) is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (5) does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining.

It is undisputed, and clearly established, on this record, that the information sought here is "data;" that it is regularly maintained in the regular course of Respondent's business; and that it does not pertain to training given to supervisors relating to collective bargaining. See findings 15 and 20, above. Whether disclosure of the information is prohibited by law and is reasonably available and necessary are the disputed issues of law; and a discussion of each follows.

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[5] This is statutory burden of proof. See 5 U.S.C. § 7118 (7) and (8).

1. The disclosure of the names and home addresses of bargaining-unit employees is not prohibited by law, in this case.

Since the complaint in this case was filed, the Authority has issued five decisions holding that agencies did not commit unfair labor practices when they declined to produce the home addresses of bargaining-unit employees sought by their exclusive representatives under Section 7114(b)(4) of the Statute, because the Privacy Act of 1947 prohibited such disclosure. See Farmers Home Administration Finance Office, St. Louis, Missouri, 19 FLRA No. 21, 19 FLRA 195 (July 22, 1985, hereinafter Farmers), petition for review filed sub nom. American Federation of Government Employees, AFL-CIO, Local 3354 v. FLRA, No. 85-1493 (D.C. Cir., August 6, 1985); Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 19 FLRA No. 85, 19 FLRA 675 (August 12, 1985, hereinafter, Defense Mapping); Philadelphia Naval Shipyard, 19 FLRA No. 107, 19 FLRA 899, (August 22, 1985); Social Security Administration Northeastern Program Service Center, 19 FLRA No. 108, 19 FLRA 913 (August 22, 1985, hereinafter SSA NEPSC); and Department of Defense, Department of the Navy, Norfolk Naval Shipyard, Norfolk, Virginia, 20 FLRA No. 44 (September 30, 1985, hereinafter Norfolk Naval Shipyard.

The Privacy Act of 1947, Pub. L. No. 89-487, 80 Stat. 256 (codified as amended in 5 U.S.C. § 552 (1982)), regulates the disclosure of information contained in an agency's records within a system of records that is retrieved by reference to an individual's name or personal identifier. It is undisputed, and clear that the names and home addresses sought here are in such a system. See finding 20, above. The Privacy Act permits disclosure of information "required" to be released under the Freedom of Information Act (FOIA) Pub. L. No. 89-487, 80 Stat. 256 (codified as amended at 5 U.S.C. § 552 (1982)). As explicated by the Authority in Farmers:

> In general, the theory of the FOIA is that Federal government records should be disclosed in order to enable the public to review the actions of the government. However, there are also exemptions to the general disclosure requirements of the FOIA. Under exemption (b)(6) of the FOIA, an agency is allowed, e.g., to withhold personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy. In determining whether material may be properly withheld in accordance with exemption (b)(6) of the FOIA, the Federal courts have struck a balance between the individual's privacy

> interest and the possible adverse or harmful effects on the individual which could result from disclosure, on the one hand, against the importance of the public's interest in having the information made available. [citing *Department of the Air Force v. Rose*, 425 U.S. 352 (1976)[6]].

See 19 FLRA at 197.

The Authority has announced that it will use the same test applied by the courts in evaluating FOIA request, "i.e., balancing the necessity of the data for the union's purposes against the degree of intrusion on the individual's privacy interests caused by disclosure of the data" (*Farmers*, 19 FLRA at 197; and see also *Defense Mapping*, 19 FLRA at 677; *Philadelphia Naval Shipyard*, 19 FLRA at 900; *SSA NEPSC*, 19 FLRA at 915; and *Norfolk Naval Shipyard*, 19 FLRA No. 44, at page 3.

The Authority has further announced that it would be guided by a decision of the U.S. Court of Appeals for the Fourth Circuit in which a union sought the home addresses of unit employees under FOIA. In this decision, *American Federation of Government Employees, AFL-CIO, Local 1923 v. United States Department of Health and Human Services*, 712 F.2d 931 (1983, hereinafter *AFGE* v. *HHS*), the Fourth Circuit struck the balance and ruled against disclosure. The language guide used by the Authority is found at 712 F.2d at 932 and is as follows:

> Employees have a strong privacy interest in their home addresses. Disclosure could subject the employees to an unchecked barrage of mailings and perhaps personal solicitations, for no effective restraints could be placed on the range of uses to which the information, once revealed, might be put. Further, even granting that collective bargaining is a matter of grave public concern, any benefits flowing from disclosure of the information sought would inure primarily to the union, in a proprietary sense, rather than to the public at large. Finally, as the District Court noted, alternative means of communication are available to the union, such as its bulletin board and indirect distribution through the employer. (footnote omitted).

See *Farmers*, 19 FLRA at 197-198; and see also *Defense Mapping*, 19 FLRA at 677; *Philadelphia Naval Shipyard*, 19 FLRA at 901; *SSA NEPSC*, 19 FLRA at 915; and *Norfolk Naval Shipyard*, 20 FLRA No. 44, at page 4.

6/ In this case, the Supreme Court also emphasized that "disclosure, not secrecy, is the dominant objective of the [FOIA] . . . and [exemptions to it] must be narrowly construed" (425 U.S. at 361).

In each of the above-cited Authority decisions, the Authority struck the balance in favor of nondisclosure, and noted that the unions in each had alternative means of communications with members of the bargaining unit. These means are set forth in footnote 7 to Farmers, as follows:

> In this regard, the Union could have communicated with unit employees through "desk drops" of information as authorized by the parties' collective bargaining agreement; direct distributions at entrances; meetings in conference rooms provided by management under the negotiated agreement; bulletin boards; and union stewards who had access to unit employees at their workplace.

They are set forth in footnote 6 to Defense Mapping, as follows:

> In this regard, the Union could have communicated with unit employees, e.g., through the use of bulletin boards; the Respondent's bulletins and newspaper; meeting space during non-duty hours; Union newspapers distributed in non-security areas; semi-annual membership drives; and a network of Union officers and stewards with access to employees in non-security areas. The extent to which some of these means of communication were subject to restrictions, such as the Union's obligation to submit advance requests, does not in our opinion detract from our finding that the Union had alternative means of communication available, especially as we note the long bargaining history of the parties, including matters with regard to means of communication.

They are set forth in footnote 5 to Philadelphia Naval Shipyard, as follows:

> In this regard, the Union could have communicated with unit employees, e.g., through the use of its right, pursuant to the parties' collective bargaining agreement, to one steward for every 85 employees; through access to one-half of all unofficial bulletin boards, which are placed in accordance with Union recommendations; through access to the Respondent's weekly newspaper; through its own monthly newspaper and other literature which is distributed throughout the Shipyard; and through its holding of monthly meetings on and off the base. The extent to which some of these means of communication were subject to restrictions, such as the Respondent's right to approve Union entries in the Respondent's newspaper, or the times during which distributions may be

> made, does not in our opinion detract from our finding that the Union had alternative means of communication available, especially as we note the established bargaining history of the parties, including matters with regard to means of communication.

They are set forth in footnote 6 to SSA NEPSC, as follows:

> In this regard, the Union could have communicated with unit employees, e.g., through the use of open bulletin boards on each floor of the Respondent's facilities; through the distribution of its newsletter which is given out on a desk-to-desk basis four times a year by the Respondent; through additional on-site distributions of its own material; and through the use of its network of officers and stewards with access to unit employees. The extent to which some of these means of communication were subject to restrictions, such as the use of the internal mail system for mass mailings and the times during which publications may be distributed, does not in our opinion detract from our finding that the Union had alternative means of communication available, especially as we note the established bargaining history of the parties, including matters with regard to means of communication.

They are set forth in footnote 6 to Norfolk Naval Shipyard, as follows:

> In this regard, the Union could have communicated with unit employees, e.g., through the use of its right, pursuant to the parties' collective bargaining agreement: to meet with new employees; to space for regular meetings; to Union office space; to a steward system; to exclusive use of bulletin boards located in each shop; and to access to the Respondent's newsletter. Further, the record indicates that the Union also has access to unit employees through the distribution of its own newsletter to each shop at the Respondent's facilities. The extent to which some of these means of communication were subject to restrictions, such as the Union's obligation to submit advance requests for meeting times, does not in our opinion detract from our finding that the Union had alternative means of communication available, especially as we note the long bargaining history of the parties, including matters with regard to means of communication.

The similarities between the "alternative means of communication" cited in the above footnotes and those in this case are marked. Compare the facts recited in the above footnotes to finding 23, above.

However, the distinctions between the five, above-cited Authority cases and this case are also marked. First of all, the request here was made while the exclusive representative of the unit employees was at the bargaining table and trying to formulate proposals over a management decision to realign their offices. The realignment could result in unit employees being reassigned to a different job. It could also result in some being relocated, even to a different State, and thus having to change their home address. Nothing strikes closer to an employee's heart than where he or she must work and what job he or she must perform. Under these circumstances, most if not all employees would gladly yield their privacy interests in their present home addresses to their exclusive representative, so that their representative could strike the best possible bargain on retraining them for their new jobs and obtaining maximum relocation allowances for those forced to relocate and obtain new home addresses -- items which the Council was bargaining about when the Council made the request for the names and home addresses of unit employees. See finding 19, above. Paraphrasing the guide which the Authority intends to follow in weighing disclosure versus nondisclosure (AFGE v. HHS), the benefits flowing from disclosure of the information sought would inure primarily to the unit employees, and only to the Council in that it would allow the Council to represent the interests of the unit in a more intelligent and effective manner. In its Norfolk Naval Shipyard decision, the Authority expressly noted that the request there was "not in connection with a grievance or any specific bargaining proposals." See page 2 of 20 FLRA No. 44, emphasis supplied.

Secondly, most unit employees are not members of the Council; and their names are apparently unknown to the Council, which thinks the unit size is about 500, whereas it is, in fact, about 900 or more. See finding 6, above. In all but the Norfolk Naval Shipyard decision, it was established in each of the Authority decisions ruling in favor of nondisclosure that the unions had, at least, been given the names of those in the unit. (In Norfolk Naval Shipyard the union must have had the names; and, in any event it sought only the home addresses). Lacking the names of all unit employees severely restricts the Council's use of the alternative means of communication available to it, such as the use of the FTS and internal mail service, in seeking to represent non-members.

And, thirdly, the bargaining-unit employees here involved were dispersed throughout the country, rather than in one metropolitan area or a single shipyard as was the situation in the five, above-cited Authority decisions wherein the Authority found that the balancing test favored nondisclosure. Working in one metropolitan area or a single shipyard, a union's network of officers and stewards can much more readily reach the unit employees than in the situation here. Here, the short-handed network of stewards, not even knowing the names of all the unit employees, would be hard pressed to reach all, to ascertain their preferences and needs on bargaining proposals currently under negotiation at the time the request for names and home addresses was made.

Since the Authority has announced that it will "use a balancing test" in each case to weigh disclosure versus nondisclosure, it must intend to favor disclosure, under appropriate circumstances. This case, in my judgment, presents that set of circumstances.[7]

2. The information sought is reasonably available.

See finding 20, above. Respondent protests otherwise, and points to two facts -- that the request was made "at the mid-point of the negotiations;" and that the requests could not be satisfied "practically overnight" (R. BR. 13-14). It is true that the request was so timed; that it would take a while to compile the information; and that Article 4 of the parties' collective bargaining agreement provides for completion of bargaining within 10 days. However, the contract also provides that all time frames under Article 4 may be modified by mutual consent.

Although a witness for Respondent testified to the logistical problem of obtaining the names and home addresses of the unit employees, he had not undertaken any study or analysis of the logistics involved. Nor had he made any actual attempts to contact supervisory personnel to determine the difficulties involved in extracting the information from files held by them. Nor had he contacted the Central Payroll Office to determine how soon that office's computer could generate the names and home addresses sought. Since the payroll stubs generated by the computer bear a "Union Code" (see finding 20 c, above), the computer might have been able to accomplish this in a short time. The Authority has just ruled that evidence showing data is not reasonably available "falls within the purview of [an agency's] special knowledge relating to the data sought," under Section 7114(b)(4). See U.S. Nuclear Regulatory Commission, 20 FLRA No. 35 (1985) and footnote 26 to Administrative Law Judge Louis Scalzo's decision, which the Authority adopted. An agency's burden of proof that data is not reasonable available is not met by the type of speculative evidence adduced in this case.

3. The information sought is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.

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[7] Administrative Law Judge William B. Devaney, in Department of Health and Human Services, Social Security Administration, Case No. 5-CA-50187 (OALJ-85-136) held, on September 18, 1985, that the recent Authority decisions, above cited, constrained him to find that the Privacy Act prohibited the disclosure of home addresses of unit employees. In that case, the unit was dispersed throughout Northeastern Ohio, but not nationwide, as here. And the request did not come in the middle of negotiations over a matter of such strong employee interest, as here. Thus, that case is distinguishable from this, on its own particular facts.

It is manifest that, in order to frame intelligent bargaining proposals, a union must be able to communicate effectively with the employees in the unit it represents -- to obtain their views on bargaining priorities; to ascertain their concerns; and to obtain information. See *Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida*, FLRC No. 72A-50, 2 FLRC 106, 109 (1974), a decision under Executive Order 11491, the precursor of the Statute. And see also a decision under the National Labor Relations Act, *Prudential Insurance Co. of America v. N.L.R.B.*, 412 F.2d 77, 84 (2d Cir., 1969), *cert. denied*, 396 U.S. 928 (1969). This, and other private sector cases involving labor relations have recognized that the names and home addresses of bargaining unit employees are necessary for this purpose. See *e.g.*, *United Aircraft Corp. v. National Labor Relations Board*, 434 F.2d 1198 1204 (2d Cir. 1970), *cert. denied*, 401 U.S. 993 (1971) and *Magma Copper Co.*, 208 NLRB 329 (1974).

In the instant case, the Council was at the bargaining table negotiating over a proposed realignment affecting offices where unit employees work. The realignment could have resulted in the forced relocation of unit employees to perform new assignments. The Council requested the names and home addresses of the unit employees in order to identify their training needs; to ascertain their work experience so that the Council would have some idea of the amount of training needed; to obtain feedback on their commuting and carpool arrangements and how a relocation would affect them; to ascertain how many would be eligible for discontinued service retirement so that the Council would know whether to seek some agreement to encourage such retirements, and thus limit the number of employees impacted by the realignment; and to determine how many would be eligible for the hardship exception to automatic reassignments. This information was necessary to assist the Council in continuing to formulate proposals and to set bargaining priorities. While the Council's negotiation team had been able to contact 27 employees personally known to members of the team, it had no idea of what the other unit employees faced or wanted. Alternative means of communicating with unit employees were ineffective for this type of confidential exchange between unit employees and their exclusive representative, particularly since the Council could not even identify just who the unit employees were, other than those who were Council members. See findings 6 and 23, above.

Under Section 7114(a)(1) of the Statute, the Council has a statutory duty to represent and bargain for non-members as well as members. In the case at bar, the Council estimated that only about thirty percent of the unit employees belonged to the Council. Actually, the percentage may be considerably smaller, because the Council's estimate was based upon a belief that the unit was only approximately 500 in number, and I have credited the testimony of Respondent's witness that, in fact, it was about 900 in number. See finding 6, above. Private sector cases have compelled production of names and home addresses where the percentage of union membership far exceeded that percent. See, e.g., Magma Copper Co., 208 NLRB at 330 where the membership was 60 percent of bargaining unit. With such a low percentage of members, it was necessary for the Council to be able to contact non-members in order to assess the needs and interests of the bargaining unit as a whole.

Moreover, the necessity for the data has not ceased merely because the realignment negotiations have concluded. The Council still needs the names and home addresses to police the agreement reached and to prepare for additional negotiations concerning the closing of certain FAO satellite offices also impacting upon unit employees, and as to which the Council has requested bargaining.

Respondent does not really argue that the information sought was not necessary. Rather, it argues that the Council "just refused or was not interested in providing any explanation to the Respondent at any time prior to the hearing as to why the information was necessary or relevant" (R. BR. 10-11). Such an explanation is required of a requesting union, if only to enable the agency to determine whether the Privacy Act prohibits disclosure. However, a union is not required to state, and then restate the obvious. Here, the parties were in negotiations over a management proposal to realign 10 regional offices and had already discussed, but not reached agreement on such topics as training for reassigned employees, hardship exceptions to relocations and reassignments, and discontinued service retirements. The Council made a written request for the information in order "to continue to formulate proposals" (see finding 15, above). What more explicit reason did Respondent really need?[8] The fact that the Council's negotiating team gave no further, oral explanation does not "bar it" from entitlement, as Respondent argues. See R. BR. 12. Nor does the fact that Respondent ultimately agreed to give the Council certain, different information, in order to police the agreement. See R. BR. 13 and finding 19 b, above. This information would come to the Council too late for the purpose of formulating proposals and setting bargaining priorities.

Ultimate Findings and Recommended Order

Respondent has committed the unfair labor practice alleged in the complaint and thereby violated Sections 7116(a)(1), (5) and (8) of the Statute.

Accordingly, and pursuant to 5 CFR § 2423.29 and 5 U.S.C. § 7118 of the Statute, it is hereby ordered that the Department of Health and Human Services, Social Security Administration, shall:

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[8] To the extent that Council witnesses testified at the hearing that they needed the information to police the agreement, I would agree that Respondent was not given this reason in time for it to perform the balancing test required for Privacy Act considerations.

1. Cease and desist from:

(a) Refusing and failing to furnish, upon request of American Federation of Government Employees, AFL-CIO, or its agent, the National Council of SSA Field Assessment Locals, the names and home addresses of all Field Assessment Office employees represented by it.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Upon request of the American Federation of Government Employees, AFL-CIO, or its agent, the National Council of SSA Field Assessment Locals, furnish the names and home addresses of all Field Assessment Office employees represented by it.

(b) Post at its facilities, in each regional office employing Field Assessment Office employees constituting the bargaining unit represented by the National Counsel of SSA Field Assessment Locals, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the head of the Field Assessment Office component of the Social Security Administration, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 CFR § 2423.30, notify the Regional Director, Region II, Federal Labor Relations Authority, 26 Federal Plaza, Room 2237, New York, New York 10278, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: October 9, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse or fail to furnish, upon request of the American Federation of Government Employees, AFL-CIO, or its agent, the National Council of SSA Field Assessment Locals, the names and home addresses of all unit employees represented by it.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the American Federation of Government Employees, AFL-CIO, or its agent, the National Council of SSA Field Assessment Locals, furnish the names and home addresses of all unit employees represented by it.

____
(Agency or Activity)

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278 and whose telephone number is: (212) 264-4934.

*U.S. G.P.O. 1987-181-223:60002

9/case 413

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 413 REPORT OF CASE DECISIONS December 22, 1986

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REPRESENTATION CASE

24 FLRA No. 67 (December 19, 1986)

Department of the Treasury, Office of Chief Counsel, National Office, Internal Revenue Service and National Treasury Employees Union, Case No. 3-RO-60003

UNFAIR LABOR PRACTICE CASES

24 FLRA No. 64 (December 18, 1986)

U.S. Department of Commerce, Bureau of the Census and American Federation of Government Employees, Local 2782, AFL-CIO, Case No. 3-CA-40404

24 FLRA No. 66 (December 19, 1986)

Defense Property Disposal Region Ogden, Utah and Defense Property Disposal Office (DPDO), Camp Pendleton, Oceanside, California, Case No. 8-CA-50227

24 FLRA No. 68 (December 19, 1986)

Department of Health and Human Services, Health Care Financing Administration and American Federation of Government Employees, AFL-CIO, Case No. 3-CA-20319

24 FLRA No. 71 (December 22, 1986)

United States Department of Agriculture, Washington, D.C. and United States Department of Agriculture, Farmers Home Administration, Little Rock, Arkansas and National Federation of Federal Employees, Local 108, Case No. 6-CA-50489

Y3.F31/21-3:

ARBITRATION CASES

24 FLRA No. 65 (December 19, 1986)

Defense Logistics Agency, Defense Property Disposal Service, Defense Reutilization and Marketing Region, Memphis, Tennessee and American Federation of Government Employees, AFL-CIO, Local 2501 (Johnston, Arbitrator), Case No. 0-AR-1271

24 FLRA No. 69 (December 19, 1986)

Defense Logistics Agency, Defense Depot Memphis, Memphis, Tennessee and American Federation of Government Employees, Local 2501 (Jewett, Arbitrator), Case No. 0-AR-1257

24 FLRA No. 70 (December 19, 1986)

American Federation of Government Employees, AFL-CIO, Local 2004 and New Cumberland Army Depot (Gershenfeld, Arbitrator), Case No. 0-AR-1270

Federal Labor Relations Authority

24 FLRA No. 64

Dept. of Commerce, Bureau of the Census and AFGE, Local 2782, Case No. 3-CA-40404
(Decided December 18, 1986)

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(5)
  INFORMATION
AGENCY ULP (ALLEGED) 7116(a)(8)
  7114(b)(4)
INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE
  NECESSITY OR RELEVANCE FOR FULL AND PROPER DISCUSSION
    SIMILARLY SITUATED EMPLOYEES
      SUPERVISORS AND/OR MAN. OFFICIALS VS. UNIT EMPLOYEES
  REQUEST FOR INFORMATION
    REQUEST BROADER THAN STATED PURPOSE FOR SEEKING INFORMATION
  TYPES OF INFORMATION SOUGHT
    PROMOTION
      QUALIFICATION WORKSHEETS
POSITION, FILLING OF
  CREDITING PLANS
    QUALIFICATION WORKSHEETS
UNFAIR LABOR PRACTICES, PROCEDURE
  EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISIONS
    ALLEGATION NOT CONTAINED IN THE COMPLAINT OR RECORD
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  INFORMATION, PROVIDE UNION WITH

STATUTE

7114(b)(4)
7116(a)(1), (5) and (8)
7118

DIGEST NOTES

The agency did not violate sections 7116(a)(1), (5) and (8) when it refused the union's request for seven black notebooks containing requests for personnel actions and for other records bearing on preselection for competitive position vacancies. The union claimed that the information was necessary for grievances alleging violations of merit promotion procedures. However, the requested notebooks and records contained a large amount of information on various types of personnel actions, including personnel actions for supervisory and management officials, which

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has no bearing on the union's functions as an exclusive representative and which is unrelated to the union's claim that the agency engaged in preselection activity.

An argument by the General Counsel that the agency violated the Statute by failing to respond in a timely manner to the union's request for information was not sustained by the Authority. The allegation was not included in the complaint and was not developed in the record before the Judge.

The agency violated section 7116(a)(1), (5) and (8) when it failed to furnish the union with sanitized copies of qualification worksheets used to rank candidates for competitive promotion. The union sought the information in order to process a grievance alleging the preselection of an employee in violation of the agency's merit promotion program. The qualification worksheets requested by the union pertaining to past selection actions did not contain crediting plans or other related information, the release of which would undermine the fairness and validity of the agency's current selection procedures.

24 FLRA No. 65

Federal Labor Relations Authority

Defense Logistics Agency, Defense Property Disposal Service, Defense Reutilization and Marketing Region, Memphis, Tennessee and AFGE, Local 2501 (Johnston, Arbitrator), Case No. 0-AR-1271 (Decided December 19, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION, PROCEDURE	7122(a) and (b)
SERVICE	
DATE MAILED VS. DATE RECEIVED	
TIMELINESS	
APPEAL UNTIMELY FILED	

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely filed.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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24 FLRA No. 66

Federal
Labor Relations
Authority

Defense Property Disposal Region, Ogden, Utah and Defense Property Disposal Office (DPDO), Camp Pendleton, Oceanside, Cal. and Leighton Thomas Leavitt, An Individual, Case No. 8-CA-50227 (Decided December 19, 1986)

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(1)
  - SECURITY
- HEALTH AND SAFETY
  - COLLECTIVE BARGAINING AGREEMENT PROVISION
    - MONITORING COMPLIANCE WITH
  - OSHA REGULATIONS
    - MONITORING COMPLIANCE WITH
- SECURITY
  - ESPIONAGE AND/OR SABOTAGE
    - PHOTOGRAPHY RESTRICTIONS
  - MILITARY INSTALLATIONS
    - PHOTOGRAPHY RESTRICTIONS
  - MONITORING OF UNION OFFICIAL'S ACTIVITIES
- UNION OFFICIALS
  - MONITORING OF UNION OFFICIAL'S ACTIVITIES

STATUTE

7102
7116(a)(1)
7118

DIGEST NOTES

The activity, which was located on a military installation, did not interfere with, restrain, or coerce a union shop steward by closely monitoring his activities for a two hour period. The steward engaged in activity protected by the Statute when he took photographs of hazardous substance disposal site -- an area not restricted by military regulations for taking photographs -- in order to document possible violations of OSHA regulations which also would constitute a violation of the parties' collective bargaining agreement. However, the security guards suspected the steward of taking photographs in a restricted area of a military installation. The restrictions were imposed to secure the military installation and to prevent sabotage or espionage. Under these circumstances, the activity's conduct was not unreasonable and did not violate section 7116(a)(1).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

24 FLRA No. 67

**Federal
Labor Relations
Authority**

Dept. of the Treasury, Office of Chief Counsel, National Office, IRS and NTEU, Case No. 3-RO-60003 (Decided December 19, 1986)

SUBJECT MATTER INDEX ENTRIES | STATUTE

REPRESENTATION PROCEDURE
NO BASIS FOR GRANTING REVIEW
MERE DISAGREEMENT WITH THE REGIONAL DIRECTOR'S FINDINGS

DIGEST NOTES

The Authority denied the activity's application for review of the Regional Director's Decision and Direction of Election because it expressed mere disagreement with the Regional Director's findings which were based on precedent and did not present any compelling reason for granting review.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 68

HHS, Health Care Financing Administration and AFGE and NTEU, Case No. 3-CA-20319
(Decided December 19, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(3)	7116(a)(1) and (3)

- AGENCY ULP (ALLEGED) 7116(a)(3)
  - ACCESS TO PUBLIC AREAS
  - UNION INTERNAL BUSINESS
- CODE OF FEDERAL REGULATIONS
  - 41 C.F.R. 101-20.3
  - 41 C.F.R. 101-20.7
  - 41 C.F.R. 101-20.308
  - 41 C.F.R. 101-20.702
  - 41 C.F.R. 101-20.703(a)(4)
  - 41 C.F.R. 101-20.703(a)(5)
- DUES, FEES AND OTHER UNION ASSESSMENTS [7103(a)(5)]
  - ACCESS TO PUBLIC AREAS OF BUILDINGS FOR COLLECTION OF
- FACILITIES, EQUIPMENT AND SERVICES
  - ACCESS
    - PUBLIC SPACES
      - GSA HAS EXCLUSIVE JURISDICTION IN GOV'T OWNED/LEASED
      - UNION SOLICITATION OF MEMBERSHIP AND DUES
- UNION INTERNAL BUSINESS
  - COLLECTION OF UNION DUES
    - PUBLIC AREAS OF BUILDINGS
  - SOLICITATION OF MEMBERSHIP
    - PUBLIC AREAS OF BUILDINGS
- UNITED STATES CODE
  - 40 U.S.C. 285
  - 40 U.S.C. 490(e)
  - 40 U.S.C. 490(a)(17)

DIGEST NOTES

GSA has exclusive jurisdiction, custody and control of all public spaces in Government-owned and leased buildings. 40 U.S.C. 285 and 40 U.S.C. 490(e). While tenant agencies may bring to GSA's attention activities they find disruptive to their official business, it is GSA's prerogative to act in such a case. A

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

showing of past control over the spaces, or influence on GSA, b the activity would be relevant; however such a showing was neither made nor contended in the complaint. Thus the activity this case had no affirmative duty to persuade GSA to prevent or stop the solicitation by a rival union to the exclusive representative of signatures in support of a representation petition. Accordingly, on remand from the U.S. Court of Appeals for the District of Columbia, the Authority affirmed its origina decision that the activity did not violate section 7116(a)(1) an (3).

**Federal
Labor Relations
Authority**

24 FLRA No. 69

Defense Logistics Agency,
Defense Depot Memphis,
Memphis, Tenn. and AFGE, Local
2501 (Jewett, Arbitrator),
Case No. 0-AR-1257 (Decided
December 19, 1986)

SUBJECT MATTER INDEX ENTRIES | STATUTE

ARBITRATION AWARDS, REVIEW OF, PROCEDURE
  STANDING
    PARTY TO AN ARBITRATION PROCEEDING
      GRIEVANT WHO DID NOT PARTICIPATE AS A PARTY

DIGEST NOTES

A grievant who did not participate as a party in the proceeding before the arbitrator, is not entitled under the Authority's rules and regulations to file exceptions to the arbitrator's award.

Federal Labor Relations Authority

24 FLRA No. 70

AFGE, Local 2004 and New Cumberland Army Depot (Gershenfeld, Arbitrator), Case No. 0-AR-1270 (Decided December 19, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION, PROCEDURE	7122(a) and (b)
SERVICE	
DATE MAILED VS. DATE RECEIVED	
TIMELINESS	
APPEAL UNTIMELY FILED	

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely filed.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

24 FLRA No. 71

Federal Labor Relations Authority

Dept. of Agriculture, Washington, D.C. and Dept. of Agriculture, FHA, Little Rock, Ark. and NFFE, Local 108, Case No. 6-CA-50489 (Decided December 22, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(5)	7103(a)(14)
OFFICIAL TIME	7116(a)(1) and (5)

AGENCY ULP (ALLEGED) 7116(a)(5)
  OFFICIAL TIME
COMPTROLLER GENERAL LETTERS AND DECISIONS
  46 COMP. GEN. 21 (1966)
FEDERAL PERSONNEL MANUAL
  LETTER 711-162
OFFICIAL TIME [7131]
  TRAVEL AND PER DIEM
    CONDITION OF EMPLOYMENT
    FOR BARGAINING ACTIVITIES
    NEGOTIATIONS AND COLLECTIVE BARGAINING AGREEMENT PROVISIONS
    TRAVEL EXPENSE ACT [5 U.S.C. 5701 ET SEQ.]
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  COMPLY WITH COLLECTIVE BARGAINING AGREEMENT PROVISION
  TRAVEL AND PER DIEM
UNITED STATES CODE
  5 U.S.C. 5701 ET SEQ.[TRAVEL EXPENSE ACT]

DIGEST NOTES

Since the Travel Expense Act, 5 U.S.C. 5701 et seq., does not specifically address the payment of travel expenses incurred by employees engaged in labor-management activity, the payment of travel and per diem expenses is not a matter which is excepted from the definition of conditions of employment under section 7103(a)(14) of the Statute. Moreover, travel related to labor-management relations activities is usually sufficiently within the interest of the United States to constitute official business. However, determinations as to the appropriateness of specific travel and per diem expenses which are necessary and proper under law and governing regulations would have to be made on a case-by-case basis.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In this case, the respondent activity, acting on directives from a higher agency level, refused to pay union representative travel and per diem expenses for negotiations, contrary to the parties' collective bargaining agreement. The Authority held that the agency violated section 7116(a)(1) and (5) by interfering with its subordinate activity's obligation to negotiate in good faith when it issued regulations forbidding the activity from paying the negotiated travel and per diem expenses. However, consistent with its practice, the Authority did not find that the subordinate activity was guilty of an independent violation of section 7116(a)(1) and (5) for its ministerial act of complying with directives from a higher level of agency management.

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24 FLRA No. 64

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS

Respondent

and

Case No. 3-CA-40404

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2782, AFL-CIO

Charging Party

DECISION AND ORDER

I. STATEMENT OF THE CASE

This case is before the Authority on exceptions filed by the General Counsel and the Respondent to the attached decision of the Administrative Law Judge. The case concerns whether the Respondent violated section 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute by failing to comply with requests for information by the Charging Party (the Union) under section 7114(b)(4) of the Statute.

II. BACKGROUND

The following information was requested by the Union: (1) seven black notebooks maintained by the administrative office of the Respondent's population division containing requests for personnel actions, (2) other records in the population division bearing on preselection for competitive position vacancies, and (3) copies of all qualifications worksheets (minus all individually identifiable material) used to rank candidates for competitive promotions during a specified period. The Union claimed that the information was necessary for grievances alleging violations of merit promotion procedures in certain selection actions and for negotiations on the Respondent's merit assignment program.

The Respondent failed to furnish the information and a complaint was issued alleging violations of the Statute.

III. THE JUDGE'S DECISION

The Judge concluded that the Respondent had not violated the Statute by failing to furnish the notebooks or other population division records bearing on preselection. He determined that the Union's request for all the contents of all seven notebooks far exceeded what was necessary and relevant to assist in processing grievances or in collective bargaining negotiations and that other records bearing on preselection did not exist. Accordingly, to this extent, he recommended that the complaint be dismissed. However, the Judge concluded that the Respondent had violated the Statute as alleged by failing to furnish the Union with a sanitized copy of all qualification worksheets used to rank candidates for competitive promotions for the period requested. Consequently, he recommended that the Respondent be ordered to cease and desist from refusing to furnish this information and that the Respondent be ordered to furnish this information to the Union.

IV. POSITIONS OF THE PARTIES

The General Counsel argues that the Union's request for the seven notebooks reasonably conveyed the intent that its request was limited to selection actions and that consequently by determining that the request exceeded what was necessary and relevant, the Judge erred in concluding that there was no violation. The General Counsel also argues that the Judge should have concluded that the Respondent violated the Statute by failing to respond in a timely manner to the Union's request for the notebooks and other population division records.

The Respondent argues that the Judge erred by concluding that the complaint was broad enough to encompass the request for qualification worksheets. The Respondent also argues that the Judge erred by concluding that it was obligated to furnish the worksheets. Specifically, the Respondent maintains that its obligation ceased when it withdrew its proposed changes to the merit assignment plan. The Respondent further maintains that in any event, there was no obligation because the worksheets were requested to negotiate on the content of crediting plans which is a matter outside the duty to bargain. Thus, the Respondent claims that the complaint should have been dismissed in its entirety.

V. ANALYSIS

A. The notebooks and other population division records

We concur in the Judge's recommended dismissal of the complaint with respect to this information. The hearing testimony and an examination of the seven notebooks, made a part of the record for inspection by the Judge and the Authority, show that the notebooks contain a large amount of information on various types of personnel actions, including personnel actions for supervisory and management officials, which has no bearing on the Union's functions as an exclusive representative under the Statute and which is unrelated to the Union's claims that the Respondent had engaged in preselection activity. We find, in agreement with the Judge, that the Union did not limit its request to only those particular, identifiable, relevant documents which were necessary to the Union concerning the alleged preselections. Moreover, at the hearing, the counsel for the General Counsel answered the Judge's question of whether the Respondent "must provide everything that is requested in order to satisfy the complaint" in the affirmative.

The General Counsel's argument that the Judge should have concluded that the Respondent violated the Statute by failing to respond in a timely manner to the Union's requests for information also cannot be sustained. This allegation was not included in the complaint and was not developed in the record before the Judge. See Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii, 14 FLRA 564, 566 (1984).

B. The qualification worksheets

We find that the Respondent's failure to furnish the Union with the qualifications worksheets in dispute constituted a violation of the Statute as alleged in the complaint. In so finding, we adopt the Judge's ruling, as explained at note 1 of his decision, that the complaint was broad enough to encompass the request for the qualification worksheets. We also disagree with the Respondent's contentions that it was not obligated to furnish the worksheets. Contrary to the contention of the Respondent, we adopt the Judge's ruling that the Respondent's obligation to furnish the qualification worksheets did not cease when it withdrew its proposed changes to the merit assignment plan. As explained by the Judge at page 12, note 14 of his decision, the reopener provision in the parties' collective bargaining agreement permitted both parties to initiate bargaining on the assignment plan during the term of the agreement. See Internal Revenue Service, 17 FLRA 731, 737 (1985), appeal filed as to other matters sub nom. National Treasury Employees Union v. FLRA, No. 85-1361 (D.C. Cir. June 14, 1985). In addition, we reject the contention that because the content of crediting plans is not negotiable, there is no obligation under section 7114(b)(4) to furnish the qualification worksheets. The issue of the release and disclosure of this information is a separate issue which is not resolved by virtue of the content of crediting plans being nonnegotiable. National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 23 FLRA No. 91 (1986).

VI. CONCLUSIONS

We conclude in agreement with the Judge that the complaint should be dismissed with respect to the Union's request for the notebooks and other population division records. We also conclude in agreement with the Judge that the Respondent violated section 7116(a)(1),(5), and (8) of the Statute by failing to comply with the Union's request for the qualification worksheets. However, for the reasons which follow we will modify his recommended remedy.

In U.S. Customs Service, 23 FLRA No. 91, which issued after the Judge's decision, we addressed in detail the release and disclosure of crediting plan and related rating information. In finding the proposal (providing that existing crediting plan information will be disclosed to the union on request) nonnegotiable, we ruled that the proposal was inconsistent with government-wide regulation because the proposal would authorize a blanket disclosure of crediting plan information without regard to whether the release of that information would undermine the fairness and validity of selection procedures. Slip op. at 3. In terms of this case, the Respondent has not argued, and has not shown, before the Judge or before the Authority, and it is not otherwise apparent, that the qualification worksheets requested by the Union pertaining to past selection actions contain crediting plan or other related rating information the release of which would undermine the fairness and validity of the Respondent's current selection procedures. We are concerned, however, that a remedy for the violation which orders unqualified disclosure of the worksheets might require the Respondent to release crediting plan or other related rating information which would undermine the fairness and validity of the Respondent's current selection procedures. Accordingly, we will modify the affirmative remedy recommended by the Judge to require the Respondent to furnish the worksheets to the Union which, consistent with FPM Supplement 335-1, will not undermine the fairness and validity of the Respondent's current selection procedures. See U.S. Customs Service.

VII. ORDER

A. Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the U.S. Department of Commerce, Bureau of the Census, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish to the American Federation of Government Employees, Local 2782, AFL-CIO, the employees' exclusive representative, copies of the qualifications worksheets, minus individually identifiable material, requested by the exclusive representative on June 30, 1984, which will not undermine the fairness and validity of current selection procedures.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Furnish to the American Federation of Government Employees, Local 2782, AFL-CIO, the employees' exclusive representative, copies of the qualifications worksheets, minus individually identifiable material, requested by the exclusive representative on June 30, 1984, which will not undermine the fairness and validity of current selection procedures.

(b) Post at its facilities copies of the attached Notice on forms furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief, Population Division, Bureau of the Census, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the Notices are not altered, defaced, or covered by any other material.

3. Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

B. It is further ordered that the complaint is dismissed as to the Union's other requests for information.

Issued, Washington, D.C., December 18, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish to the American Federation of Government Employees, Local 2782, AFL-CIO, the employees' exclusive representative, copies of all qualifications worksheets, minus individually identifiable material, requested by the exclusive representative on June 30, 1984, which will not undermine the fairness and validity of current selection procedures.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Labor-Management Relations Statute.

WE WILL furnish the American Federation of Government Employees, Local 2782, AFL-CIO, the employees' exclusive representative, copies of the qualifications worksheets, minus individually identifiable material requested by the exclusive representative on June 30, 1984, which will not undermine the fairness and validity of current selection procedures.

____
(Activity)

Dated: ________________ By: ________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: P.O. Box 33758, 1118 18th Street, NW., Room 700, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

U.S. DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS

Respondent

AND — Case No. 3-CA-40404

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2782, AFL-CIO

Charging Party

. . . .

C. J. Schmidt, Esq. and
George E. Maden, Esq.
For the Respondent

Ms. Ruth Sanders and
Mr. Edward V. Hanlon
For the Charging Party

Ana de la Torre, Esq. and
Bruce D. Rosenstein, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq.

Upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 2782, AFL-CIO (hereinafter referred to as the Union) against the U.S. Department of Commerce, Bureau of the Census (hereinafter referred to as the Respondent), the General Counsel of the Authority, by the Regional Director for Region III, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing and refusing to provide the Union with certain personnel records requested by the Union on "December 19, 1983, and at all times since . . . in connection with a pending grievance, a potential grievance and an upcoming contract reopener."[1]

The hearing on the Complaint was conducted in Washington, D.C. at which all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by all parties and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Union has been the exclusive collective bargaining representative of various GS, GG and WG employees of Respondent located in the Washington, D.C. metropolitan area. The collective bargaining unit is comprised of approximately 3,000 employees of which about 220 employees are employed in Respondent's Population Division.

In early December 1983, Edward Hanlon, an employee in Respondent's Population Division and the Union's Chief Steward, grieved what he perceived to be Respondent's intention to select employee David Galdi to fill a vacancy for which Hanlon was also a candidate. Subsequently, around December 15, Hanlon went to the Population Division Administrative Office to inquire about the status of a within-grade wage increase he was scheduled to receive. In response to his inquiry, an employee in the Administrative Office retrieved one of seven notebooks which were labeled "Personnel" or "Personnel Actions" from a shelf and for about 30 seconds "flipped" through it before coming to an index which contained the information concerning within-grade increases. Hanlon testified that while the pages in the notebooks were being "flipped", he noticed the book contained various documents entitled "Request for Personnel Action" (also called "SF52") and various memo's, some titled "Recommendation for Promotion." According to Hanlon, on some of the SF52's an employee's name appeared in handwriting with the comment "designee" or "selectee" next to the name.

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[1] In its brief Respondent objected to including under the Complaint herein the failure of Respondent to furnish various information the Union requested after December 19, 1983. Respondent made the same objection at the hearing at which time I informed Respondent that I construed the Complaint to be broad enough to encompass the requests for information made after December 19. Respondent indicated it did not wish additional time to prepare its defense and was ready to proceed and present its case on the allegations. Thereafter the matter was fully litigated. Accordingly, I hereby reaffirm my rulings made at the hearing on this issue and overrule Respondent's objection.

By letter to Respondent dated December 19, 1983 the Union, by Chief Steward Hanlon, requested all seven notebooks located in the Administrative Office. The request, citing 5 U.S.C. Chapter 71, stated:

> "It is known these notebooks contain SF52's cut for the division, that they have indexes with them that contain employee's name, type of action requested, and a division number for the SF52. It is strongly believed that some of these SF52's have employees (sic) names (preselectees) written on the forms for what are supposed to be competitive vacancies. It is also strongly believed that promotion recommendation memos, memos recommending promotion of certain employees for competitive vacancies, are also contained in these volumes containing the SF52's."

The Union's letter provided the following "justification" for the request:

> "1. Grievance of Edward Hanlon involving illegal preselection for every Population Division grade 13 position he has ever applied for and been denied.
>
> "2. Potential Union grievance on behalf of all employees harmed by the merit principles violations of Population Division which now appear to have been persistent, patent managerial policy.
>
> "3. Pursuant to the 30 day contract reopener on CAM Chapter E-4.
>
> To bargain on the Merit Promotion System, the Union needs evidence and information on how the Agency implements the present plan so that Union bargaining proposals may be formulated to stop poor managerial practices, plan violations, favoritism, and pre-selections." (Emphasis in the original).

On December 28, 1983, the Union notified Respondent that it was instituting a grievance "concerning the administration of the Merit Promotion Plan . . . and the negotiated agreement dealing with the filling of competitive vacancies . . ." which would apply to the entire Census Bureau.[2]

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[2] During the hearing the parties resolved various aspects of this controversy which resolution included limiting this case to matters concerning only the Population Division within the Census Bureau.

By two separate letters on December 29, 1983 the Union notified Respondent that based upon its investigation of the "pre-selection of David Galdi," supra,[3] it appeared that preselection also occurred involving employees Barbara vander Vate, Michael Levin and others for GS-13 positions in the Population Division which Hanlon had applied for in the past. The letters stated that the Hanlon grievance might be extended to include every job he ever applied for in the Population Division; that "it now appears likely that every job or almost every job filled since at least October 1980 in the Population Division involved pre-selection and favoritism;" and that it appeared the Administrative Office kept "careful records" of this preselection for the 1981-1984 fiscal years.

By letter dated January 13, 1984, Respondent notified the Union that, absent factual support for the Union allegations of pre-selection in the administration of the Merit Promotion Plan, it was not taking further action on the Union's December 28, 1983, grievance, supra. On the following day Respondent notified the Union that Hanlon's December 29, 1983 grievance, supra, alleging preselection of vander Vate and Levin was denied since Respondent concluded that the qualification and rating process were in accordance with the Bureau's Merit Promotion Program.

On January 19, 1984 Hanlon filed a formal grievance with Respondent alleging the preselection of vander Vate, Levin and the selections made for every other grade 13 position he applied for in the Population Division. On that same day the Union filed a formal grievance with Respondent alleging preselection and favoritism in the Population Division "for almost every single competitive position it has filled since at least October 1981." The Union alleged Respondent "violated the Merit Promotion Plan, Civil Service Reform Act, Government in Ethics Act, the contract, (and any) other pertinent rule, law, and regulation dealing with the filling of competitive vacancies."

Apparently pursuant to a contract reopener provision Respondent, at some undisclosed time during this period, proposed changes in the agency's Merit Promotion Plan. According to unchallenged testimony received at the hearing, the parties contract also contained a provision permitting "full scope bargaining," i.e. both parties were permitted to make whatever proposals they wished "bearing on the subjects of bargaining."[4] By letter dated March 20, 1984 Hanlon, who had by now become the Union's President, reminded Respondent that it had not responded to prior "Chapter 71" requests for information, namely the binders located in the Administration Office. Hanlon stated, inter alia:

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[3] The text of one letter reveals that the vacancy announcement involving Galdi was withdrawn.

[4] The parties' collective bargaining agreement was not placed in evidence at the hearing.

> "These documents are requested by the Union pursuant to your proposed bargaining changes to the Merit Assignment Plan, to possible bargaining on CAM Chapter E-4, pursuant to Mr. Hanlon's formal grievance on preselection involving Population Division, and pursuant to the Union's formal grievance on preselection in the Agency."[5]

Respondent denied the Union's request for information by letter dated April 3, 1983, stating:

> "Regarding your requests of . . . December 19, 1983, since division administrative practices are neither a part of the Merit Assignment Plan nor have any bearing on the process, it is not clear that the documents requested are necessary for the full and proper discussion and understanding of the formal grievance on preselection or bargaining the Agency's proposed changes to the Merit Assignment Plan. Consequently, we must deny your request at this time."

On April 18, 1984 Respondent provided the Union with a copy of a proposed Priority Placement Program suggested to the Union that bargaining commence on May 1. The Union on May 1 replied by suggesting that negotiations be delayed until June 1 for various reasons and Respondent subsequently suggested that negotiations commence on July 2. The Union responded on June 29, 1984[6] informing Respondent that, "if the Union decides to bargain, prior to bargaining and in order to have all relevant information on which to formulate bargaining proposals," it required the notebooks from the Administrative Office, supra, for the period March 1982 to March 1984 "in order to ascertain priority placement activities."

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[5] CAM Chapter E-4 refers to that portion of Respondent's administrative manual which treats Respondent's Merit Assignment Plan.

[6] Meanwhile, on May 15, 1984 the Union filed the unfair labor practice charge herein alleging:

> "The Agency refused to supply information reasonably available and necessary for Agency-proposed bargaining on Priority Placement & The Merit Promotion Plan. This

(continued)

On June 30, 1984 the Union sent another letter to Respondent, this one entitled "Merit Assignment Program (MAP) Bargaining and Requests Under 5 U.S.C. Chapter 71." That correspondence stated, inter alia:

> " . . . since rating and ranking are alleged to be key factors in facilitating Agency-wide pre-selection, the Union needs the following information to determine how the present rating and ranking procedures are used to facilitate pre-selection, the input of the immediate supervisor (often accused of pre-selection), and the relationship of illegal pre-selection activities under the existing system to Merit Assignment. This information will be used to formulate the Union's bargaining proposals, if the Union decides to bargain. The information requested is as follows:
>
> "1) The Black Notebooks maintained by Nancy Hope of POP division, allegedly showing how pre-selection is done and how rating and ranking procedures are developed to facilitate pre-selection.
>
> "2) Using POP Division as an example, all other records in POP Division bearing on pre-selection, including the development of ranking factors.
>
> . . . .
>
> "6) A copy of all qualifications worksheets (minus all individually identifiable material) used to rank candidates for competitive promotions in the last

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6/ (continued)

> information is also necessary for on-going Union and personal grievances on violation of merit promotion procedures, violation of the Merit Promotion Plan and Priority Placement and pre-selection. This information had been requested in writing citing 5USC71."

The Union amended the charge on August 14 to alleged:

> "Since on or about December 19, 1983 and continuing to date, the above-named Agency, by its officers and agents has failed and refused to provide information to the Union in violation of Section 7114(b) of the Statute.

> year so that the relationship of awards, performance ratings, education, background, and experience can be studied in relation to your new proposals and the present system."[7]

Respondent did not reply to the Union's June 29 and 30 requests for information. However, on the day of hearing herein, Respondent for the first time notified the Union it was withdrawing its proposals regarding changes in the Merit Assignment Programs. Hanlon testified that regardless of Respondent's position, pursuant to the reopener provision providing for future negotiations on the Merit Promotion Plan and the "full scope bargaining" provision in the parties collective bargaining agreement, the Union nevertheless might still wish to negotiate on changes in the Merit Promotion Plan.[8]

Discussion and Conclusions

Counsel for the General Counsel contends Respondent violated section 7116(a)(1), (5) and (8) of the Statute when it failed and refused to furnish the Union with the documents requested on December 19, 1983, June 29, 1984 and June 30, 1984, supra.

Respondent contends: (1) the Union's request for the entire contents of the seven black notebooks was too broad in scope to require compliance since many of the documents in the notebooks contained material unrelated to the matters for which their production was ostensibly sought; (2) it was under no duty to supply ". . . all other records in (the Population) Division bearing on preselection . . ." since such documents are non-existent; and (3) the request for copies of "all qualifications worksheets . . . used to rank candidates for competitive promotions . . ." seeks information for bargaining on a nonnegotiable matter and accordingly Respondent was under no obligation to make the data available to the Union.

It is well settled that under section 7114(b)(4) of the Statute[9] management is required to furnish an exclusive representative with necessary and relevant information which would enable it to effectively carry out its representational obligations including processing a grievance, determining whether to file a grievance and negotiating on matters affecting working conditions. See United States Environmental Protection Agency, Health Effects Research Laboratory, Cincinnati, Ohio, 16 FLRA No. 16 (1984) and cases cited therein and cf. American Federatio of Government Employees, AFL-CIO, Local 3483, 13 FLRA No. 80 (1984). However, the Authority has held that no requirement to provide informatio will be found where the information sought does not exist [Division of Military and Naval Affairs, State of New York, Albany, New York, 8 FLRA 307 (1982) at 320-321, and cases cited therein] or was not contained in the requested documents [Marine Corps Logistics Base, Barstow, Californi 14 FLRA No. 105 (1984)]. Further, an agency will not be found to have violated the Statute for failing to produce information where the data requested is broader than reasonably necessary to the performance of representational responsibilities in question [Director of Administratio Headquarters, U.S. Air Force, 6 FLRA 110 (1981) and cf. United States Customs Service, Region IV, Miami, Florida, 3 FLRA 876 (1980)] or an insufficient nexus exists between the nature of the requested informatio sought and the purpose which such data is to be used [Internal Revenue Service, Buffalo District, Buffalo, New York, 7 FLRA 654 (1982)].

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[7] Union President Hanlon testified that with regard to this matter, the Union ". . . may wish to make proposals changing the way factors are given for awards, experience, training . . . performance ratings, education." On cross-examination Hanlon testified: "I requested the items in number six in order to put together proposals regarding the ranking of candidates . . ."

[8] At no time did Respondent indicate it would be burdensome to supply the Union with any of the information requested.

[9] Section 7114(b)(4) provides:

(continued)

9/ (continued)

"(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation --

. . . .

"(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data --

"(A) which is normally maintained by the agency in the regular course of business;

"(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

"(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]"

In the case herein the Union sought production of seven notebooks to support its grievance on preselection in the Population Division and in order to assist it in formulating bargaining proposals on a Merit Promotion Plan and priority placement procedures. As to these matters it is obvious that necessary and relevant information would include form SF-52's concerning vacancies, position descriptions, promotions, appointments, conversions and the like and memoranda, recommendations, transmittal slips, letters, worksheets and related documents as well as the ranking procedures and factors in effect. However, as revealed in an index of these notebooks[10] and the notebooks themselves, the notebooks contain substantial additional data not relevant to matters at issue herein or necessary for full and proper discussion, understanding and negotiations of these subjects. Thus, the notebooks contain documents requesting such actions as leave without pay, resignations, return to duty, terminations, quality step increase awards, name changes, terminations of details, separations and transfers, reassignments, change of duty hours and merit pay cash awards. The notebooks also include the following documents not necessary or relevant to the Union's avowed concerns: employee accountability and clearance forms; draft position descriptions never used; draft ranking factors never used; letters dealing with return to duty or offering a position; transmittal slips regarding leave without pay, notary papers, unsigned forms and change of duty hours; a doctor's statement; a memorandum requesting a payroll schedule change and an employee professional background statement.

The Union required information for two specific purposes: evaluating and processing preselection grievances and negotiating on Merit Promotion Plan matters including Priority Placement Procedures. The Union could quite easily have worded its request so as to convey that only data relating to those matters was being sought. The request, so long as it specifically identified the revelant information sought, could have been stated in explicit and detailed language or in broad, general terms at the Union's election. Both such descriptions have been found by the Authority in litigated cases to give rise to a obligation to furnish necessary and relevant data under the Statute. See e.g. Social Security Administration, 15 FLRA No. 180 (1984); Army and Air Force Exchange Service (AAFES), Lowry

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[10] The index (Joint Exhibit No. 27) was prepared by Respondent and placed in evidence in lieu of providing the Union or Counsel for the General Counsel with the notebooks at the hearing. In response to my ruling, Respondent has supplied me with copies of the notebooks for in camera inspection. I have informed the parties that these copies of the notebooks will remain in the record under seal for inspection only by reviewing authorities until the conclusion of litigation in this matter, thereafter to be returned to Respondent.

Air Force Base Exchange, Ft. Carson, Colorado, 13 FLRA No. 65 (1983); Veterans Administration Regional Office, Denver, Colorado, 7 FLRA 629 (1982); Department of Health and Human Services, Social Security Administration, Field Assessment Office, 12 FLRA No. 84 (1983); and Internal Revenue Service, Western Region, San Francisco, California, 9 FLRA 480 (1982). However, the Union herein decided to merely request the entire contents of the notebooks without limiting the request to only those particular, identifiable, relevant documents necessary to pursue the matters at issue.

Accordingly, as the Union's request for all the contents of all seven notebooks far exceeded what was necessary and relevant to assist it in processing grievances or negotiating on a condition of employment, and no good cause having been shown as to why such a broad request should require production of the information, I am constrained to conclude insufficient evidence exists to support the contention that Respondent's refusal to furnish the notebooks violated the Statute. Cf. Director of Administration Headquarters, U.S. Air Force, supra; United States Customs Service, Region IV, Miami, Florida, supra; and Internal Revenue Service, Buffalo District, Buffalo, New York, supra.

The Union also requested ". . . all other records in the POP Division bearing on pre-selection, including the development of ranking factors." No evidence adduced at the hearing indicates that such "other records" exist and indeed Colleen Woodard, Labor Relations Officer for the Bureau of the Census, testified that such documents do not exist. Accordingly, I conclude no violation of section 7116 of the Statute has not been established by Respondent's failure to furnish the requested information. Division of Military and Naval Affairs, State of New York, Albany, New York, supra.

The Union's final request of June 30, 1984 was for "(a) copy of all qualifications worksheets (minus all individually identifiable material) used to rank candidates for competitive promotions in the last year . . ." Respondent argues that the Union has indicated that this information is necessary to formulate proposals regarding a crediting plan[11] which, Respondent contends, is not negotiable.

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[11] Respondent relys upon a reply Union President Edward Hanlon gave to a question put to him by Respondent's counsel on cross-examination. The entire cross-examination on this matter is as follows:

"Q (By Mr. Schmidt) Mr. Hanlon, isn't it true that you requested the items in number six in order to develop a crediting plan?

"A I requested the items in number six in order to put together proposals regarding the ranking of candidates. If that is a crediting plan, yes, but that's what I did it for."

Respondent, citing the court's decision in U.S. Customs Service v. Federal Labor Relations Authority, 739 F. 2d 829 (2d. Cir. 1984), reasons that since crediting plans are not negotiable, an agency has no obligation to provide information for union bargaining proposals on this subject.

In U.S. Customs Service, supra, the court set aside the decision of the Authority in National Treasury Employees Union and NTEU Chapter 153, 161 and 183 and U.S. Customs Service, Region II, 11 FLRA No. 47 (1983) wherein the Authority found, inter alia, that a union's negotiating proposal setting forth a specific crediting plan was negotiable. The court refused to enforce the Authority's order concluding that requiring the Customs Service to bargain with the union over the contents of crediting plans would interfere with rights reserved to management under the Statute. However, I am constrained to follow the Authority's holding until such time as the Authority specifically revises its position on the matter or it becomes apparent that the Authority will no longer adhere to this position. I conclude therefore, that based upon existing Authority precedent Respondent was required to furnish the Union that qualifications worksheets it requested. Cf. National Treasury Employees Union and NTEU Chapter 153, 161, 183, supra; National Treasury Employees Union and Department of Health and Human Services, Region X, Seattle, Washington, 5 FLRA 688 (1981); and International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, 3 FLRA 438 (1980).

Moreover, in the case herein the Union did not propose a crediting plan for negotiations wherein it could be ascertained that the proposed plan, in fact, impermissibly impinged on management rights. All that is before me is a request for information, i.e. sanitized copies of the qualifications worksheets used to rank candidates for competitive promotions during the last year.[12] Thus, it would be premature to conclude that whatever proposal the Union might make, if any, would concern a nonnegotiable matter. Indeed, after reviewing the qualifications worksheets the Union might decide to make no proposals[13] or submit a proposal dealing with grieving matters regarding the ranking of candidates for promotion and relevant procedures.[14] Such subjects would clearly be negotiable. Accordingly, I conclude that by its failure to furnish the Union with a sanitized copy of all qualifications worksheets used to rank candidates for competitive promotions for the period requested, Respondent violated section 7116(a)(1), (5) and (8) of the Statute.

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[12] The record does not disclose precisely what information is contained on "qualifications worksheets."

[13] As a union is entitled to information to assist it in deciding whether to file a grievance, in my view it follows that it is also entitled to data in order to determine whether to make contract proposals on an otherwise negotiable matter.

In view of the entire foregoing, I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Department of Commerce, Bureau of the Census shall:

1. Cease and desist from:

    (a) Failing and refusing to furnish to the American Federation of Government Employees, Local 2782, AFL-CIO, the employees' exclusive representative, a copy of all qualifications worksheets, minus all individually identifiable material, used to rank candidates for competitive promotions during the period between July 1, 1983 and June 30, 1984.

    (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured br the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

    (a) Furnish the American Federation of Government Employees, Local 2782, AFL-CIO a copy of all qualifications worksheets, minus all individually identifiable materials, used to rank candidates for competitive promotions during the period between July 1, 1983 and June 30, 1984.

---

[14] I find no merit in Respondent's position that since the agency withdrew its proposals concerning the Merit Assignment Program, that matter is no longer a subject for collective bargaining and the agency therefore is not obligated to furnish the information. Testimony establishes that the contract reopener provision in the parties' collective bargaining agreement allows either Union or Respondent to make proposals regarding changes in the agency's Merit Promotion Plan.

(b) Post at its D.C. metropolitan area facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, 1111 18th Street, N.W., Suite 700, P.O. Box 33758, Washington, D.C. 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

It is further ordered that the remaining allegations be, and hereby are, dismissed.

Salvatore J Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: February 5, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish to the American Federation of Government Employees, Local 2782, AFL-CIO, the employees' exclusive representative, a copy of all qualifications worksheets, minus all individually identifiable material, used to rank candidates for competitive promotions during the period between July, 1, 1983 and June 30, 1984.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL furnish the American Federation of Government Employees, Local 2782, AFL-CIO a copy of all qualifications worksheets, minus all individually identifiable materials, used to rank candidates for competitive promotions during the period between July 1, 1983 and June 30, 1984.

____
(Agency or Activity)

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region , whose address is: 1111-18th Street, N.W., Suite 700, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE LOGISTICS AGENCY, DEFENSE
PROPERTY DISPOSAL SERVICE, DEFENSE
REUTILIZATION AND MARKETING REGION,
MEMPHIS, TENNESSEE

Agency

and

Case No. 0-AR-1271

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2501

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator J. Reese Johnston, Jr. filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated October 20, 1986, and, in the absence of evidence to the contrary, appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on November 24, 1986.

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

The Union sent the exceptions by certified mail from Memphis, Tennessee on November 21, 1986. However, the exceptions were not received by the Authority at its national office in Washington, D.C., until November 26, 1986, and, therefore, were untimely filed.

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., December 19, 1986.

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE PROPERTY DISPOSAL REGION
OGDEN, UTAH AND DEFENSE PROPERTY
DISPOSAL OFFICE (DPDO), CAMP
PENDLETON, OCEANSIDE, CALIFORNIA

Respondent

and Case No. 8-CA-50227

LEIGHTON THOMAS LEAVITT, An Individual

Charging Party

DECISION AND ORDER

I. Statement of the Case

This case is before the Authority based on exceptions to the attached Administrative Law Judge's Decision filed by the Defense Property Disposal Region--Ogden (DPDR) and the Defense Property Disposal Office--Pendleton (DPDO) (Respondent). The General Counsel filed an opposition to the exceptions. The complaint, as amended, alleged that Respondent violated section 7116(a)(1) of the Statute by engaging in surveillance and/or monitoring of a bargaining unit employee because he engaged in representational activities.

II. Background

The facts, more fully set out in the Judge's Decision, indicate that the Charging Party, Leighton Thomas Leavitt, was employed by Respondent at the Pendleton DPDO until April 1985 as a Receiver, Sorter, Classifier. The Pendleton DPDO receives various materials from units at Pendleton and other locations which it stores and subsequently arranges for disposition. Some of the materials coming to the facility are hazardous substances. From late December 1984 until April 1985 Leavitt served as Shop Steward for the Ogden Regional Council of AFGE Locals (the Council), which represents various employees at the Pendleton DPDO. During this period he filed several unfair labor practice charges against Respondent and several "Notice(s) of Alleged Unsafe or Unhealthful Working Conditions" with his foreman.

The circumstances giving rise to this action occurred on March 11, 1985, when Leavitt noticed unit employees loading allegedly hazardous materials onto military vehicles, which in Leavitt's view violated the collective bargaining agreement between the Council and Respondent. Leavitt went to a roadway adjacent to the storage site during his afternoon break and took photographs of the activity in the site and returned to work. Leavitt's actions were observed by another employee who informed Leavitt's supervisor, Mac Bojorquez. Bojorquez immediately telephoned Base Security to inquire whether Leavitt's actions constituted a breach of security regulations since Leavitt was observed near a high security area where taking photographs was restricted.

The officer assigned to security duty, Marine Sergeant Jones, informed Bojorquez that he did not think that photographs were permitted on the site, but he would have to check the regulations to make sure. Meanwhile Jones told Staff Sergeant Phillips of his conversation with Bojorquez. Phillips decided to go to the DPDO to investigate the matter. Upon arriving at Leavitt's work site, Phillips questioned Leavitt about the incident. Leavitt denied taking pictures or having a camera. Leavitt did admit to having pretended to take pictures of the disposal site. When Phillips asked Leavitt why he was taking pictures, Phillips testified that Leavitt "said something about being a member of the union." Phillips told Leavitt that he had nothing to do with this "field" (presumably referring to labor relations) but Leavitt could explain to the Military Police. Phillips then phoned the Base Military Police and informed them that they should handle the matter. However, because of the unavailability of a Military Police Investigator, Phillips was requested by the Military Police to "observe" Leavitt and ask Leavitt not to leave the base.

Phillips decided to wait for the Military Police Investigator and was talking to Leavitt at his desk when Commander of the Guard Jones arrived with his driver, another guard. The guards remained within 25 feet of Leavitt when he was at his desk. Leavitt continued to work, sometimes walking around but closely followed by Jones or Phillips. Jones asked Leavitt whether he had taken pictures, and Leavitt indicated that he had only pretended to take pictures. Leavitt gave no further explanation of his actions.

When Leavitt's workday ended at 3:30 p.m., he asked the guards if he could leave to pick up a "carpooler," and received no response. He then went to his car, which was blocked in its space by the security guard's vehicle. Jones denied knowing that the security vehicle was blocking Leavitt's car. Shortly after 4:00 p.m., Leavitt went to his car, Jones moved the security vehicle, and Leavitt left.

After 4:15 p.m., Bojorquez received a call from Colonel Kirkham who related that research had disclosed that photography was prohibited in numerous areas in Camp Pendleton, but no such restriction applied to the DPDO. Bojorquez then told Phillips that the DPDO would take care of the situation and Phillips telephoned the Military Police to let them know the state of affairs after which the security guards left the DPDO.

Before the Judge, Jones testified that he was perplexed as to why anyone would want to pretend to take pictures and was concerned about possible espionage or sabotage. Leavitt testified that he took the photographs to record alleged violations of Occupational Safety and Health Administration (OSHA) requirements and to show that the agency had not fulfilled its commitments to OSHA regarding the hazardous waste.

Leavitt also asserted that he acted consistent with Article 15, Section 8 of the parties' collective bargaining agreement, which provides:

> In the course of performing normally assigned work, employees acting in the capacity of Union representatives will be alert to observe unsafe practices, equipment and conditions . . . . If an unsafe or unhealthy condition is observed, the representative should report to the cognizant immediate supervisor. If the safety question is not settled by the representative and the immediate supervisor, or the DPDO . . . , the representative will refer the matter promptly to . . . the Region Safety and Health Manager who will act on behalf of the Employer(s).

III. Administrative Law Judge's Decision

The Judge found that Leavitt was engaged in activity protected by the Statute when he took photographs of the disposal site. The Judge rejected Respondent's contention that it lacked knowledge that Leavitt was engaged in union activity when he photographed the disposal site and found that Leavitt's actions on March 11, 1985, reasonably should have alerted foreman Bojorquez that Leavitt was engaged in union activity. The Judge concluded that under the circumstances, Leavitt's being kept under surveillance by security guards for almost two hours constituted interference, restraint and coercion of Leavitt for having engaged in conduct protected by the Statute. The Judge found that the agency's actions, by their very nature, would tend to intimidate and inhibit a shop steward from engaging in activity protected by the Statute.

IV. Positions of the Parties

The Respondent excepts to the Administrative Law Judge's decision that "there does not appear to be any dispute that Leavitt was engaged in activity protected by the Statute when he took photographs of the disposal site." Respondent argues that Leavitt's conduct was in violation of the parties' agreement and, therefore, was not protected by the Statute. Respondent also objects to the Judge's decision that circumstances should have alerted Respondent's foreman Bojorquez that Leavitt was engaged in union activity; the Respondent argues that employees of the DPDO are permitted to take photographs only with the express consent of the Defense Property Disposal Officer and Leavitt failed to notify the appropriate authority that he was going to take photographs on behalf of the union. Finally, Respondent excepts to the Administrative Law Judge's findings that control over the DPDO and security guards' activities remained with foreman Bojorquez at all times and that the security guards' belief that regulations prohibited taking pictures at the DPDO and their actions were not reasonable.

The General Counsel filed a brief in response to the Respondent's exceptions in which it agreed with the Judge's findings and recommended Order.

V. Analysis

The question here is whether the Respondent's conduct in observing Leavitt for a two-hour period tended to interfere with, restrain, or coerce Leavitt in the exercise of his rights under the Statute.

We find first, and in agreement with the Judge, that Leavitt's conduct in photographing what he viewed as a possible contract violation was protected by the Statute. The Authority has previously found that protected activity under section 7102 of the Statute encompasses an employee's right to conduct an investigation on his own time to support a grievance or in contemplation of filing a grievance. Department of Defense Dependents Schools, Mediterranean Region, Naples American High School (Naples, Italy), 21 FLRA No. 103 (1986); Department of Justice, Bureau of Prisons, Federal Correctional Institution, Butner, North Carolina, 18 FLRA No. 100 (1985). Leavitt's action is protected by the Statute because the photographs were taken in contemplation of filing grievances relating to the Respondent's noncompliance with safety requirements and its alleged violation of the collective bargaining agreement.[1] However, in the circumstances of this case, we find that the Respondent's subsequent conduct in observing Leavitt was not a violation of the Statute. Rather, the Respondent's action was based on security considerations.

The record indicates that Leavitt's actions took place within the confines of a military installation and were subject to certain restrictions, including restrictions on taking photographs, imposed by the military host activity on the tenant activity employing him. The restrictions were imposed to secure the installation and to prevent sabotage or espionage. The record further shows that Leavitt was suspected of taking photographs in a prohibited area. Even though Bojorquez did not witness the incident, when he received the report of photographing, he called Base Security because of a possible security breach. The guards who subsequently observed Leavitt were doing so pending a determination on the security breach issue. Under these circumstances, the Respondent's conduct was not unreasonable and did not interfere with Leavitt's rights under the Statute or in any other way violate section 7116(a)(1) of the Statute.

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[1] Respondent's contention that Leavitt's activity violated the parties' collective bargaining agreement should be resolved through the parties' negotiated grievance and arbitration procedures. Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region, 23 FLRA No. 62 (1986).

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. We have considered the Judge's decision, the positions of the parties and the entire record, and adopt the Judge's findings and conclusions only to the extent consistent with the above. We conclude that the Respondent did not violate section 7116(a)(1) of the Statute by "monitoring" Leavitt's activity after he was observed taking photographs of the facility and by questioning Leavitt about a suspected breach of security. Accordingly, the complaint shall be dismissed in its entirety.[2]

ORDER

The complaint in Case No. 8-CA-50227 is hereby dismissed.

Issued, Washington, D.C., December 19, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In view of this decision, we find it unnecessary to address the Agency's remaining exception.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEFENSE PROPERTY DISPOSAL REGION, OGDEN, UTAH AND DEFENSE PROPERTY DISPOSAL OFFICE (DPDO), CAMP PENDLETON, OCEANSIDE, CALIFORNIA

Respondent

and — Case No. 8-CA-50227

LEIGHTON THOMAS LEAVITT

Charging Party

. . . .

Thomas E. Fehr, Esq.
For the Respondent

Jonathan S. Levine, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.*

Upon an unfair labor practice charge filed by Leighton Thomas Leavitt, an individual, against the above captioned Respondent,[1] the General Counsel of the Authority, by the Regional Director for Region VIII, issued a Complaint and Notice of Hearing alleging

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[1] The Respondent appears as amended at the hearing.

Respondent violated section 7116(a)(1) of the Statute by engaging in surveillance and/or monitoring a bargaining unit employee because of his having engaged in representational activities.

A hearing on the Complaint was conducted in Vista, California at which Respondent and the General Counsel were represented by counsel[2] and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by counsel for the General Counsel and counsel for Respondent and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein various of Respondent's employees located at the Camp Pendleton facility of the Defense Property Disposal Office (herein DPDO) have been represented for collective bargaining purposes by the Ogden Regional Council of AFGE Locals (herein called the Council). The Charging Party, Leighton Thomas Leavitt, was employed by Respondent at the Pendleton DPDO for approximately four years until being transferred to another facility in April 1985. While at Pendleton Leavitt was employed as a Receiver, Sorter, Classifier. The Pendleton DPDO receives various materials from units at Pendleton and other locations which it stores and subsequently arranges for disposition. Some of the materials coming to the facility are hazardous substances.

From late December 1984 until sometime in April 1985 Leavitt served as Shop Steward for the Council at the Pendleton DPDO. During this period Leavitt filed five unfair labor practice charges against Respondent and five "Notice(s) of Alleged Unsafe or Unhealthful Working Conditions" with his foreman. Even before becoming Shop Steward Leavitt was concerned with health and safet in the work place. Thus, a complaint from Leavitt to the Occupational Safety and Health Administration (OSHA) gave rise to an inspection of the Pendleton DPDO by OSHA in September 1984.[3] Part of OSHA's findings reported on December 28, 1984 indicated: that the Pendleton DPDO had changed its procedures for handling hazardous substances in that hazardous materials would no longer be handled by DPDO employees; a contractor was to remove all such materials within a week, and; thereafter hazardous materials would not be sent to the Pendleton DPDO.

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[2] The Charging Party was present throughout the hearing but made no appearance in a representative capacity.

[3] Respondent was aware of Leavitt's complaint to OSHA.

Subsequently Leavitt observed that Respondent did not fulfill its commitments made to OSHA. Thus, hazardous material continued to be stored at the DPDO. On March 11, 1985 Leavitt noticed unit employees loading the hazardous material onto military vehicles. In his opinion management's conduct in this regard was violative of the collective bargaining agreement between the Council and Respondent which was in effect at all times material herein and required compliance with OSHA standards.[4] Accordingly, Leavitt went to a roadway adjacent to the storage site around 2:00 p.m. during his afternoon break and took some photographs of the activity in the site and returned to work. Leavitt's actions had been observed by another employee, Randall Beck, who informed Leavitt's supervisor, Mac Bojorquez, Property Management Foreman, that he saw Leavitt about 30 to 40 feet away from the storage site apparently taking pictures of the men in the storage site loading the hazardous material onto a truck.[5]

Foreman Bojorquez immediately telephoned Base Security and spoke to U.S. Marine Corps Staff Sergeant David Jones who was the Commander of the Guard that day. Bojorquez informed Jones that Leavitt was observed taking pictures and wished to know if this constituted a breach of security regulations since Bojorquez was aware that purchasers of DPDO equipment who came to the site were required to have written authorization from the Base Commanding Officer before taking pictures. Jones informed Bojorquez that he didn't think anyone was permitted to take photographs without written authorization.[6] Bojorquez then talked to Leavitt and told him that he had been observed taking pictures of the site and had called Security and inquired as to regulations concernin photographing. Bojorquez informed Leavitt that he was not to be taking pictures much less being near the hazardous area because his assignment was working in the warehouse.

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[4] Article 15, Section 1A of that agreement provides:

> "The Employer(s) will, to the extent of its authority, provide and maintain safe and healthful working conditions for all employees. Safe and healthful working and conditions will be determined in accordance with the definitions and standards contained in Section 19 of the Occupational Safety and Health Act (OSHA), in Executive Order 12196, and in implementing regulations and directives."

[5] The storage site is in close proximity to Camp Pendleton airfield. Beck testified that from Leavitt's position while photographing, it was not possible for him to be taking a picture of the airfield. This fact however was not conveyed to Bojorquez.

Foreman Bojorquez then called Defense Property Disposal Regio (DPDR) in Ogden and conveyed what had thus far transpired concerning Leavitt to U.S. Air Force Colonel Thomas Kirkham, Commander of DPDR, and Security Officer Chuck Lambert. After Bojorquez told Lambert of having been told by the Security Guard office that regulations against taking pictures existed, Lambert indicated he would call someone else on the base about this matter. Thereafter, according to Bojorquez, he remained by his telephone in the event Colonel Kirkham called and, although he was aware when security guards arrived, he did not know of thei conduct at the DPDO, infra.

Meanwhile Commander of the Guard Jones told Guard Officer Staff Sergeant William Phillips of his conversation with Bojorquez. Phillips decided to go to the DPDO to investigate the matter and arrived at the warehouse shortly after 2:15 p.m. on that same day.[7] Phillips testified when he arrived at the DPDO Bojorquez told him that he saw Leavitt taking pictures of the disposal site. From Bojorquez's description of where Leavit was standing when he took the pictures Phillips concluded there would have been a clear view of the Pendleton airfield and this concerned Phillips.[8]

Guard Officer Phillips then went to Leavitt who was at his work desk in the receiving area.[9] In response to Phillips' questions, Leavitt denied taking pictures or having a camera. However, Leavitt did admit to having pretended to take pictures of the disposal site. Phillips left Leavitt and went to Bojorquez's work site and told him of Leavitt's denial. Bojorquez insisted that Leavitt had a camera and Phillips responded that he did not have the right to make a search. Phillips went back to Leavitt's work area where Leavitt was standing by a doorway. Phillips related to Leavitt that Bojorquez said he had a camera and was taking pictures and Phillips asked Leavitt why he was taking pictures. Leavitt then said something about being a member of the Union and began talking about having cancer.[10] Phillips indicated he had nothing to do with this "field" but would let Leavitt explain to the military police. Phillips then telephoned the Base Military Police and informed them they should handle the matter. However, the Military Police investigator was not available at the time. Accordingly, Military Police requested that Phillips "observe" Leavitt and ask Leavitt not to leave the base.

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[6] Jones testified he didn't have time to specifically check the applicable regulations.

[7] When he arrived, Bojorquez was talking on the phone with Security Office Lambert. Bojorquez turned the phone over to Phillips who also talked with Lambert. The record does not disclose the content of this conversation.

[8] Leavitt testified that while there were no signs or regulations against taking pictures around the DPDO or at Camp Pendleton in general, he understood some locations around the airfield were "posted".

[9] The following account of what transpired is essentially a composite of credited portions of the testimony of Leavitt,

(continued)

Guard Officer Phillips decided to wait for the Military Police investigator and was talking to Leavitt at his desk when Commander of the Guard Jones arrived around 2:40 p.m. with his driver, another Guard. Phillips told Leavitt he should wait for the Military Police and related the state of affairs to Jones. The three guards remained in Leavitt's work area frequently very close by but always within 25 feet from Leavitt when he was at his desk.[11] Leavitt continued to work, sometimes walking around but always closely followed by either Phillips or Jones.[12] After coming on the scene Jones questioned Leavitt

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[9] (continued)

Phillips and Jones. I do not credit the entire testimony of any of these witnesses, each of whom was at times vague, implausible, self contradictory, inclined to exaggerate and give testimony in a self serving manner. In addition, I was not particularly impressed with the demeanor of any of these witnesses.

[10] Leavitt testified he had bladder cancer. In any event, Leavitt's testimony does not reveal that he attempted to explain that his actions were in any way related to his Union membership or functions as Shop Steward.

[11] Another employee was also working in Leavitt's work area.

[12] On one occasion Leavitt went to a bathroom and was followed to the door by Jones who remained outside.

at his desk as to whether he had taken pictures and Leavitt indicated he had only pretended to take pictures. Jones acknowledged that when Leavitt left his desk to go to other areas, he followed Leavitt "trying to get some answers." He further testified he was perplexed as to why anyone would want to pretend to take pictures and was concerned about possible espionage or sabotage. Leavitt gave no further explanation of his actions but told Jones about various aspects of his work. In any event, it is apparent that Leavitt was kept under open surveillance at all times the security guard was at the DPDO.

Leavitt's work day ended at 3:30 p.m. Around that time Leavitt told the security guards he had a "carpooler" to pick up and asked if he could leave but received no response. He then went to the loading dock where he observed that his automobile was blocked in its parking space by the security guard's vehicle.[13] Shortly after 4:00 p.m. Leavitt went to his car, Jones moved the security vehicle and Leavitt left.

After 4:15 p.m. Foreman Bojorquez received a telephone call from Colonel Kirkham who related that research into the matter disclosed that although photography was prohibited in numerous areas at Camp Pendleton, there was no such restriction applicable to the DPDO. Upon receiving this information Bojorquez told Sergeant Phillips that the DPDO would take care of the situation and Phillips telephoned the Military Police to let them know the state of affairs after which the security guards left the DPDO.

Discussion and Conclusions

Counsel for the General Counsel essentially contends that by having Shop Steward Leavitt placed in custody and/or monitoring his activities for having engaged in activities protected by the Statute, Respondent coerced and restrained Leavitt in the performance of his representational duties in violation of section 7116(a)(1) of the Statute.

Counsel for Respondent contends no violation of the Statute has been established since: Respondent had no knowledge that Leavitt was engaged in union activity; no agency relationship exists between Respondent and the security guards and; even if the conduct of the security guards was attributable to Respondent, such conduct was reasonable under the circumstances and was therefore privileged.

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[13] Jones denied knowing that the security vehicle was blocking Leavitt's automobile.

There does not appear to be any dispute that Leavitt was engaged in activity protected by the Statute when he took photographs of the disposal site and I so find. Thus, Leavitt was the Shop Steward; Respondent had made certain commitments to OSHA regarding the storage and disposal of hazardous waste; Article 15 of the collective bargaining agreement addressed the matter of safe and healthful working conditions and compliance with OSHA standards; and Leavitt's photographing the disposal site was related to the enforcement of Article 15 of the agreement.

I reject Respondent's contention that it lacked knowledge that Leavitt was engaging in union activity when he photographed the disposal site and therefore no violation of the Statute can stand. Respondent cannot deny knowledge of the terms of its collective bargaining agreement, specifically the section relating to OSHA requirements, and of the OSHA inspection, supra. Moreover, Respondent was also well aware that Leavitt was the Shop Steward and was particularly concerned with health and safety in the work place, matters of normal union interest.[14] Thus, Leavitt's actions on March 11, 1985 with regard to the hazardous material, in these circumstances, reasonably should have alerted foremen Bojorquez that Leavitt was engaged in union activity. Indeed, if Bojorquez was in doubt of whether Leavitt was photographing the removal of hazardous waste at the DPDO for personal reasons or for union related reasons, he could have asked Leavitt, but he did not. Accordingly, in these circumstances knowledge of union activity must be inferred.

I also conclude that in the circumstances herein Shop Steward Leavitt's being kept under open surveillance by security guards for almost two hours constituted interference, restraint and coercion of Leavitt for having engaged in conduct protected by the Statute. Employee Beck, who observed the photographing by Leavitt, informed foreman Bojorquez that Leavitt was taking a picture of the disposal site. Bojorquez was aware of Leavitt's concern as Shop Steward over health and safety matters and that Leavitt was the person who complained to OSHA over hazardous materials at the site. Although Beck testified that from Leavitt's position when taking pictures he could not have been photographing the airfield, he did not convey this fact to Bojorquez. However, neither did Bojorquez inquire of Beck as to what Leavitt could observe from his position. True, Bojorquez did not ask the security guards to investigate the matter and was given information from Sergeant Jones that subsequently appeared to be incorrect as to regulations prohibiting photography on the base. But when security guard Sergeant Phillips investigated the matter Bojorquez, perhaps inadvertently, conveyed that it was he who observed the photographing and misled Phillips into believing that from where Leavitt was seen with a camera he could have been photographing the airfield. Phillips acknowledged that this triggered his concern and prompted his continued inquiry into the matter. Thus, it was Bojorquez's failure to make a thorough inquiry of Beck as to the complete circumstances of Leavitt's actions and misleading Phillips which set into motion a two hour episode which might have been disposed of in two minutes if Sergeant Phillips was satisfied that photographing the airfield was not involved in the incident.

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[14] I do not find the fact that Leavitt was also concerned about his personal health in these circumstances to be significant.

I reject Respondent's contentions that the security guards' conduct cannot be attributed to Respondent. While foreman Bojorquez did not ask the security guards to investigate the matter, he provided them with the misleading information which prompted the investigation and was aware of their continued presence at the DPDO and with due diligence could have observed the nature and extent of their activities. Further, it is clear from the record that control over the DPDO and the security guards' activities remained with Bojorquez at all times. Thus, when Bojorquez, after being told by his Commander that Respondent concluded there were no regulations against Leavitt's activities, informed Sergeant Phillips that DPDO would handle the matter, the security guards ceased their inquiry and departed. In my view the facts herein demonstrate that during this incident Respondent retained sufficient control over the activities of the security guards to have created an agency relationship which cannot now be denied.

Nor do I find that the security guards' belief that regulations prohibited taking pictures at the DPDO and their actions with regard to Leavitt were reasonable under the circumstances thereby precluding a finding of violation of the Statute. Leavitt's denial of having taken pictures may well have exacerbated the situation, but this is speculative. However, as stated above, Respondent ultimately concluded Leavitt engaged in no prohibited conduct and accordingly Leavitt should not have been questioned by the security guards or have had his actions monitored from the very beginning. Indeed, it was Respondent's misleading information to Sergeant Phillips and failure to know the extent of the regulations before calling the security guards which gave rise to a course of events which never should have occurred. In such circumstances, the security guards conduct may not be regarded as reasonable and thereby serve to excuse actions which by their very nature would tend to intimidate and inhibit a shop steward from engaging in activity protected by the Statute.

In view of the entire foregoing I conclude Respondent, by the conduct described herein, violated section 7116(a)(1) of the Statute and recommend the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Defense Property Disposal Region, Ogden, Utah and Defense Property Disposal Office (DPDO), Camp Pendleton, Oceanside, California shall:

1. Cease and desist from:

   (a). Monitoring the actions of and keeping under surveillance Leighton Thomas Leavitt, or any other employee, for engaging in union representational activities.

   (b). In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

   (a). Post at its Camp Pendleton, California DPDO copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer or his designee and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

   (b). Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, 350 South Figueroa Street, 10th Floor, Los Angeles, California

90071, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: April 3, 1986
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT monitor the actions of and keep under surveillance Leighton Thomas Leavitt, or any other employee, for engaging in union representational activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071 and whose telephone number is: (818) 894-3805 or FTS 8-798-3805.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
OFFICE OF CHIEF COUNSEL, NATIONAL
OFFICE, INTERNAL REVENUE SERVICE

Activity

and Case No. 3-RO-60003

NATIONAL TREASURY EMPLOYEES
UNION

Labor Organization

ORDER DENYING APPLICATION FOR REVIEW AND REQUEST FOR STAY

On October 24, 1986, the Department of Treasury, Office of Chief Counsel, National Office, Internal Revenue Service (the Activity), filed a timely application for review, pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Direction of Election in the above-named case. The Activity also filed a request for a stay of the Regional Director's Decision and Direction of Election. In its application for review, the Activity contends that compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting the application. The National Treasury Employees Union (NTEU) filed an opposition to the application for review and request for a stay.

Upon consideration of the Activity's application for review, including all arguments in support thereof, the Authority concludes that no compelling reason exists for granting the application. Rather, the application in essence expresses mere disagreement with the Regional Director's findings which are based on precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations, the application for review and request for a stay of the Regional Director's Decision and Direction of Election are denied.

Issued, Washington, D.C., December 19, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, HEALTH CARE
FINANCING ADMINISTRATION

Respondent

and

Case No. 3-CA-20319
(18 FLRA No. 59)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

and

NATIONAL TREASURY EMPLOYEES UNION

Intervenor

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit, directing the Authority to consider the effect of regulations of the General Services Administration (GSA) on the resolution of the unfair labor practice allegation in this case. American Federation of Government Employees v. FLRA, 793 F.2d 333 (D.C. Cir. 1986).

II. History of the Case

A. The Authority's Decision

The complaint in this case alleges that the Respondent Department of Health and Human Services, Health Care Financing Administration (HCFA) violated section 7116(a)(1) and (3) of the Federal Service Labor-Management Relations Statute (the Statute) by permitting and failing to take action to prevent representatives of the Intervenor, the National Treasury Employees Union (NTEU), from soliciting HCFA employees' signatures in support of a representation petition. The Charging Party, the American Federation of Government Employees, AFL-CIO (AFGE) is the exclusive representative of HCFA employees.

On June 13, 1985, the Authority issued its Decision and Order in Department of Health and Human Services, Health Care Financing Administration, 18 FLRA No. 59 (1985). The Authority, in agreement with its Administrative Law Judge, found that HCFA had not unlawfully assisted NTEU, because the solicitations took place in public areas at Respondent's Baltimore headquarters not controlled by HCFA. The Authority further found that HCFA had no affirmative duty to insist or urge that GSA, which controls such public spaces, forbid or prevent NTEU from such solicitation. AFGE then sought judicial review of the Authority's Decision.

B. The Court's Opinion

On June 17, 1986, the court issued its opinion in American Federation of Government Employees v. FLRA, 793 F.2d 333 (D.C. Cir. 1986). The court found that in order to make a decision on the merits of the complaint, the Authority must first determine (1) the extent to which HCFA has control, or can influence control, over access to the public areas involved here; and (2) the extent to which, by past practice, HCFA has participated with GSA in decisions pertaining to access to these public areas. Further, the court directed that if the Authority determines that HCFA has any control over those public areas, it must then determine the nature of HCFA's responsibility in the event it is also determined that GSA improperly permitted NTEU access to the areas. The court remanded the case to the Authority for further treatment, emphasizing that it expressed no view on HCFA's obligations.

III. Positions of the Parties

After the Court remanded the case, we granted GSA's request to file an amicus curiae brief. Supplemental briefs were filed by AFGE and NTEU.

GSA contends that under its regulations, GSA alone has control of public space located within GSA property. GSA explained the limited circumstances in which a tenant agency has a right to request the use of such space; that is, an agency may grant permission to a labor organization to solicit membership or dues under the Civil Service Reform Act of 1978. The type of activity involved in this case did not, in GSA's opinion, fall into this category.

NTEU argues that GSA alone controls public space. NTEU acknowledges that it is unlawful for an agency to provide a rival union with access to space that is within the control of the agency. It argues, however, that the public space here was controlled only by GSA, and that GSA has not only a right to allow unions access to public space, but, upon proper request, has an obligation under section 101-20.702 of its regulations to permit access for activities such as NTEU engaged in here.

AFGE argues that GSA regulations allow agencies to request GSA to prevent certain activities in public space. It notes that section 101-20.703(a)(4) and (5) allows GSA buildings managers to disapprove an application for a permit on the grounds that the requested use "disrupts the official business of the agency or agencies occupying the public buildings" or "interferes with a tenant's quiet enjoyment of their leasehold." It argues further that where, as here, NTEU's activity clearly would have been unlawful if HCFA allowed it, HCFA had an affirmative obligation to urge GSA to forbid or prevent it. AFGE also argues that a "new hearing" is needed to determine some of the questions raised by the court.

IV. Analysis

A. GSA Regulations

The Administrator of GSA has jurisdiction, custody and control of all Federal buildings outside of the District of Columbia, including the buildings at issue here. 40 U.S.C. § 285. Further, GSA has authority to assign and reassign space of all executive agencies in Government-owned and leased buildings in and outside of the District of Columbia. 40 U.S.C. § 490(e).

Pursuant to that authority, GSA has issued regulations governing the use of public buildings and grounds, codified at 41 CFR 101-20.3 (1986). These regulations are commonly posted in public areas and were posted in the public spaces where HCFA is a tenant at the time of the events in this case. Section 101-20.308 contains a general prohibition against solicitation, vending and debt collection. Among the specific exceptions to this prohibition is subsection (c), which provides for the "solicitation of labor organization membership or dues authorized by occupant agencies under the Civil Service Reform Act of 1978." While such solicitation appears to be within the control of agencies, not GSA, that is not the type of solicitation involved in this case. It is undisputed that NTEU was soliciting only signatures in support of its efforts to file a petition for election. It was not soliciting membership or membership dues.

The Public Buildings Cooperative Use Act of 1976 encourages the use of certain public areas for cultural, educational, and recreational activities. 40 U.S.C. § 490(a)(17). Pursuant to authority granted it by that Act, GSA issued regulations regulating the "occasional use of public areas in public buildings," codified at 41 CFR 101-20.7. Under section 101-20.702, labor organizations may apply to GSA for permission to use public areas. The regulations do not specify what activities are permissible. They do specify that the permission may be granted only by GSA, not by tenant agencies.

B. Findings

We reaffirm the Authority's previous conclusion that the complaint must be dismissed. We find that:

(1) GSA has exclusive jurisdiction, custody and control of all public space in Government-owned and leased buildings. 40 U.S.C. § 285 and 40 U.S.C. § 490(e);

(2) GSA's regulations generally governing the use of public space, codified at 41 CFR 101-20.3, provide for one exception to that jurisdiction, at section 101-20.308(c): occupant agencies may allow an exclusive representative of its own employees to solicit membership and membership dues in public spaces;

(3) the solicitations conducted by NTEU at issue here were not of the type that could have been allowed or denied by HCFA;

(4) GSA has exclusive jurisdiction under the Public Buildings Cooperative Use Act of 1976 to grant permits for the use of public space, and its regulations, codified at 41 CFR 101-20.7, do not allow for any exceptions to that jurisdiction;

(5) GSA granted permission to NTEU to conduct the solicitations in question; and

(6) there is nothing in the record to show that HCFA has ever exercised control over, or influenced GSA's control over, the public spaces in these buildings.

We find that GSA alone had control over the public spaces in question, and that HCFA did not have any control over these spaces. While tenant agencies may bring to GSA's attention activities they find disruptive to their official business, it is GSA's prerogative to act in such a case. HCFA did not make any such requests to GSA in this case.

We conclude that HCFA had no affirmative duty to persuade GSA to prevent or stop the solicitations by NTEU. While a showing of past control over the spaces, or influence on GSA, by HCFA would be relevant, the General Counsel has not met the burden of showing that HCFA has controlled, or influenced GSA's control over, the public spaces in question. Moreover, such a contention was not part of the General Counsel's complaint. In these circumstances, we reject AFGE's request that the case be remanded for further hearing. We therefore find it unnecessary to determine the nature of HCFA's responsibility if it did have any control, or right to influence GSA's control, over the public spaces.

V. Conclusion

Accordingly, having considered the positions of the parties and GSA and the facts and circumstances of this case in light of our analysis of GSA's regulations, we reaffirm the Authority's original Order that the complaint in this case be dismissed.

ORDER

The complaint in Case No. 3-CA-20319 is dismissed.

Issued, Washington, D.C., December 19, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

24 FLRA No. 69

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE LOGISTICS AGENCY
DEFENSE DEPOT MEMPHIS
MEMPHIS, TENNESSEE

Agency

and

Case No. 0-AR-1257

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2501

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Mathew W. Jewett filed on behalf of Mr. Joe A. Barlow, the grievant in the above-entitled case. For the reasons set forth below, the exceptions must be dismissed.

Section 2425.1(a) of the Authority's Rules and Regulations provides:

> Either party to an arbitration under the provisions of chapter 71 of title 5 of the United States Code may file an exception to an arbitrator's award rendered pursuant to the arbitration.

Section 2421.11 of the Rules and Regulations provides in pertinent part:

> "Party" means (a) any person . . . (4) who participated as a party . . . (ii) in a matter where the award of an arbitrator was issued. . . .

In this case it appears that two parties, the Union and the Agency, participated as "parties" in the subject proceeding. Thus, it does not appear that Mr. Barlow, the grievant, participated as a "party" in the proceeding before the arbitrator. Consequently, the grievant is not entitled to file exceptions to the arbitrator's award under section 2425.1(a) of the Authority's Regulations.

Accordingly, and apart from other considerations, the grievant's exceptions are hereby denied.

For the Authority.

Issued, Washington, D.C., December 19, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Processing

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2004

Union

and

Case No. 0-AR-1270

NEW CUMBERLAND ARMY DEPOT

Activity

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Walter J. Gershenfeld filed by the Activity pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated October 22, 1986, and, in the absence of evidence to the contrary, appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on November 25, 1986. However, the exceptions were not filed with the Authority at its national office in Washington, D.C., until November 26, 1986.

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

Accordingly, as the Activity's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., December 19, 1986.

Harold D. Kessler
Harold D. Kessler
Director of Case Management

24 FLRA No. 71

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF
AGRICULTURE, WASHINGTON, D.C.

and

UNITED STATES DEPARTMENT OF
AGRICULTURE, FARMERS HOME ADMINISTRATION
LITTLE ROCK, ARKANSAS

Respondents

and Case No. 6-CA-50489

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 108

Charging Party

DECISION AND ORDER

I. STATEMENT OF THE CASE

This unfair labor practice case is before the Authority based on the Regional Director's "Order Transferring Case to the Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations. The Parties to the case are the Department of Agriculture, Washington, D.C. and the Department of Agriculture, Farmers Home Administration, jointly called Respondents and separately called Respondent Agency and Respondent Activity, respectively, and the National Federation of Federal Employees, Local 108, (the Union). The complaint alleged that the Respondent Agency violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by causing its subordinate element, the Respondent Activity, to breach provisions of the collective bargaining agreement negotiated at the level of exclusive recognition with the Union which provide for the payment of travel and per diem expenses. The complaint further alleged, in the alternative, that the Respondent Activity violated section 7116(a)(1) and (5) of the Statute by breaching provisions of the collective bargaining agreement negotiated with the Union which provide for the payment of travel and per diem expenses, thereby failing and refusing to bargain in good faith with the Union.

II. Background

Respondent Activity and the Union have been parties to a collective bargaining agreement, effective from June 22, 1983 to June 22, 1986. Article 11 of the agreement concerned the payment of travel and per diem expenses.[1]

By letter dated June 25, 1984, the Respondent Activity informed the Union of a new policy and procedure concerning the payment of travel and per diem expenses for employees representing labor organizations. Attached to the letter was a copy of USDA Personnel Letter 711-10 (May 16, 1984) issued by the Respondent Agency and an excerpt from 46 Comp. Gen. 21 (1966). The USDA Personnel Letter set forth procedures concerning the payment of travel and per diem expenses based on interpretations of the decision of the United States Supreme Court in Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89 (1983) and Office of Personnel Management guidance. USDA Personnel Letter 711-10 stated in pertinent part:

> [S]ince there is no entitlement for travel and per diem for negotiating an agreement, there can be no entitlement to travel and per diem expenses for representation purposes. Therefore, payment of travel and per diem expenses to union representatives can be made only as a unilateral management decision if such payments meet the primary interest of the Government . . . .
>
> * * *
>
> (1) All USDA labor agreements containing either general or specific authorization for payment of travel and per diem expenses to union negotiators or representatives are unenforceable in accordance with FPM Letter 711-162 and 46

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[1] The pertinent provisions of Article 11 are set forth in the appendix to this decision.

> Comptroller General 21 (1966). Management must determine, on a case by case basis, whether or not the payment of travel and per diem meets the justification requirements of the Comptroller General and is warranted.

On November 26 and December 13, 1984, the Respondent Activity and the Union met to discuss and negotiate changes in employee office hours and lunch breaks. The Respondent Activity refused to pay travel and per diem expenses to representatives of the Union for attending these negotiation sessions based on USDA Personnel Letter 711-10. On December 10, 1984, the Respondent Agency briefed the Union on management's decision to contract out certain of its functions and subsequently informed the Union that employees who attended the briefing would be paid travel and per diem expenses as that meeting was not covered by the constraints of USDA Personnel Letter 711-10.

III. Positions of the Parties

The Respondent argues that since the payment by an agency of travel and per diem expenses is governed by the Travel Expense Act and not the Statute, such payment does not concern "conditions of employment" within the meaning of section 7103(a)(14). The Respondent further argues that under Federal Law and Government-wide regulations, the payment of travel and per diem expenses can be made only as a unilateral decision by an agency. The General Counsel argues that Respondent Activity's refusal to pay travel and per diem for negotiation sessions constituted a repudiation of provisions of the parties' agreement in violation of section 7116(a)(1) and (5) of the Statute. The General Counsel argues in the alternative that the Respondent Agency caused the Respondent Activity to repudiate provisions of the parties' agreement in violation of the Statute.

IV. Analysis

We reject the Respondent's contention that the payment of travel and per diem expenses does not concern conditions of employment. In *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 FLRA No. 2 (1986), *petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA*, No. 86-1198 (D.C. Cir. Mar. 27, 1986) the Authority found that the Travel Expense Act, 5 U.S.C. §§ 5701, *et seq.*, does not specifically address payment of travel expenses incurred by employees engaged in labor-management activity. Therefore, the payment of travel and per diem expenses is not a matter which is excepted from the definition of conditions of employment under section 7103(a)(14).

The Authority further found in Department of the Treasury, U.S. Customs Service, that agencies have discretion under the Travel Expense Act, 5 U.S.C. §§ 5701 et seq., and implementing regulations, to determine whether and under what circumstances travel related to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for which employees may receive appropriate expenses from Federal funds. Consequently, based on controlling precedent the Authority held that the exercise of such discretion is subject to negotiations.[2] The Authority noted, however, that determinations as to the appropriateness of specific travel and per diem expenses which are necessary and proper under law and governing regulations would have to be made on a case-by-case basis. See Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2, slip op. at 6-7 (1986).

In this case, the Respondent Activity and the Union had negotiated for the payment of travel and per diem expenses and had included those provisions in Article 11 of their collective bargaining agreement. The Respondent has not shown that the provisions of Article 11 are inconsistent with law and regulation, so as to be outside the duty to bargain. In Department of Defense Dependents Schools System, 21 FLRA No. 125 (1986), the Authority concluded that an agency's conduct in repudiating provisions of a negotiated agreement authorizing the payment of travel and per diem expenses violated section 7116(a)(1) and (5) of the Statute. Similarly, in Adjutant General, State of Ohio, Ohio Air

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2/ See also American Federation of Government Employees, AFL-CIO, National Council of Federal Grain Inspection Locals and U.S. Department of Agriculture, Federal Grain Inspection Service, 21 FLRA No. 21 (1986) petition for review filed sub nom. Department of Agriculture, Federal Grain Inspection Service v. FLRA, No. 86-1295 (D.C. Cir. May 21, 1986) and National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 21 FLRA No. 19 (1986) petition for review filed sub nom. Department of the Treasury, Internal Revenue Service v. FLRA, No. 86-1290 (D.C. Cir. May 19, 1986), in which proposals authorizing payment of various travel and per diem expenses were found to be within the duty to bargain.

National Guard, Worthington, Ohio, 21 FLRA No. 124 (1986), the Authority found that the unilateral termination and repudiation of a memorandum of understanding which set forth ground rules for upcoming negotiations and provided for the payment of travel and per diem expenses of employees serving as the union's negotiators violated section 7116(a)(1) and (5) of the Statute. On the same basis, we find here that the Respondent Activity's refusal to pay travel and per diem expenses to the Union's representatives on November 26 and December 3, 1984 constituted a repudiation of their collective bargaining agreement which was inconsistent with the Respondent Activity's good-faith bargaining obligation in violation of the Statute. See Office of the General Counsel, National Labor Relations Board, 22 FLRA No. 25 (1986), petition for review filed sub nom. National Labor Relations Board, Office of the General Counsel v. FLRA, No. 86-1468 (D.C. Cir. Aug. 22, 1986).

We further find that the Respondent Activity at the level of exclusive recognition was following the dictates of higher level Agency management when it refused to pay the representatives of the Union. The Respondent Agency's Personnel Letter 711-10 concerning payment of travel and per diem expenses foreclosed such payments by subordinate levels because it contained the directive that all USDA labor agreements authorizing payment of travel and per diem expenses were unenforceable and that such payment can be made only as a unilateral management decision. The Authority has held that when higher-level agency management prevents management at a subordinate level of exclusive recognition from complying with its obligations under the Statute, the higher-level management violates the Statute. See Department of Health and Human Services, Social Security Administration, Region VI and Department of Health and Human Services, Social Security Administration, Galveston, Texas District, 10 FLRA 26 (1982). The Authority has held further that where the subordinate entity is deprived of discretion to comply with its statutory obligations it will not also be found to have violated the Statute. See Social Security Administration, Region VI.

Consistent with this precedent we find here that Respondent Agency's directive to Respondent Activity not to comply with Article 11 of the collective bargaining agreement negotiated with the Union at the level of exclusive recognition constitutes a violation of section 7116(a)(1) and (5) by Respondent Agency. Further, Respondent Agency's directive not to comply with the collective bargaining agreement afforded Respondent Activity no discretion to do otherwise. Consequently, its non-compliance with the collective bargaining agreement was ministerial in nature. We therefore find that Respondent Activity's action was not an independent violation of section 7116(a)(1) and (5).

Respondent relies upon the Authority's decisions in Department of the Treasury, Internal Revenue Service, Washington, D.C. and its Indianapolis, Indiana and Dallas, Texas Districts 16 FLRA 176 (1984) and United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 15 FLRA 151 (1981), affirmed on other grounds sub nom. Department of the Air Force, et. al. v. FLRA, 775 F.2d 727 (6th Cir. 1985) where the Authority found that the agencies' refusal to pay travel and per diem expenses to union representatives in connection with labor-management activities was not in violation of the Statute. Those cases are materially distinguishable from the present case. In Internal Revenue Service and Wright-Patterson Air Force Base, Ohio, the General Counsel did not allege nor did the records establish that the Respondent had repudiated a collective bargaining agreement which provided for the payment of travel and per diem expenses. In the present case, the General Counsel alleged and established that the collective bargaining agreement was repudiated. Thus the cases relied on by the Respondent in this connection are inapposite.

V. Conclusion

We conclude that the Respondent Agency interfered with the Respondent Activity's obligation to bargain in good faith in violation of section 7116(a)(1) and (5). We also conclude that the Respondent Activity did not violate the Statute as alleged in the complaint. To remedy this unfair labor practice, we shall order the Respondent Agency to cease and desist from directing the Respondent Activity not to comply with the terms of Article 11 of the collective bargaining agreement, effective June 22, 1983, between the Respondent Activity and the Union and to direct Respondent Activity to pay travel and per diem expenses to the bargaining unit employees who incurred expenses at the negotiation sessions of November 26 and December 13, 1984 and submit or previously submitted appropriate claims of such payments under the terms of Article 11 of the parties' collective bargaining agreement. Of course, such payments must be consistent not only with the terms of the parties' collective bargaining agreement, but also with law and regulation, including the Federal Travel Regulations.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Department of Agriculture, Washington, D.C.:

1. Cease and desist from:

(a) Directing the U. S. Department of Agriculture, Farmers Home Administration, Little Rock, Arkansas not to comply with the terms of Article 11 of the collective bargaining agreement, effective June 22, 1983, between the Farmers Home Administration, Little Rock, Arkansas and the National Federation of Federal Employees, Local 108, the exclusive representative of its employees at the Farmers Home Administration, Little Rock, Arkansas facility, which provides for the payment of travel and per diem expenses.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Direct the Farmers Home Administration, Little Rock, Arkansas to comply with the terms of Article 11 of the collective bargaining agreement, effective June 22, 1983, between the Farmers Home Administration, Little Rock, Arkansas and the National Federation of Federal Employees, Local 108, which provides for the payment of travel and per diem expenses to representatives of the National Federation of Federal Employees, Local 108 in connection with labor-management activities.

(b) Direct the Farmers Home Administration, Little Rock, Arkansas to pay travel and per diem expenses to the bargaining unit employees who incurred expenses at the negotiation sessions of November 26 and December 13, 1984 and submit or previously submitted appropriate claims for such payments under the terms of Article 11 of the collective bargaining agreement which was effective June 22, 1983, to the extent that such payments are consistent with the terms of the collective bargaining agreement, law and regulation, including the Federal Travel Regulations.

(c) Post at its Farmers Home Administration, Little Rock Arkansas facility where bargaining unit employees represented by the National Federation of Federal Employees, Local 108 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

IT IS FURTHER ORDERED that those portions of the complaint alleging a violation of the Statute by the Department of Agriculture, Farmers Home Administration, Little Rock, Arkansas, be, and they hereby are, dismissed.

Issued, Washington, D.C. December 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT direct the U.S. Department of Agriculture, Farmers Home Administration, Little Rock, Arkansas not to comply with the terms of Article 11 of the collective bargaining agreement, effective June 22, 1983 between the Farmers Home Administration, Little Rock, Arkansas and the National Federation of Federal Employees, Local 108, the exclusive representative at the Farmers Home Administration, Little Rock, Arkansas facility, which provides for the payment of travel and per diem expenses.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL direct the Farmers Home Administration, Little Rock, Arkansas, to comply with the terms of Article 11 of the collective bargaining agreement, effective June 22, 1983, between the Farmers Home Administration, Little Rock, Arkansas and the National Federation of Federal Employees, Local 108, which provides for the payment of travel and per diem expenses to representatives of the National Federation of Federal Employees, Local 108 in connection with labor-management activities.

WE WILL direct the Farmers Home Administration, Little Rock, Arkansas to pay travel and per diem expenses to the bargaining unit employees who incurred expenses at the negotiation sessions of November 26 and December 13, 1984 and who submit or have previously submitted appropriate claims for such payments under the terms of Article 11 of the collective bargaining agreement, effective June 22, 1983, to the extent that such payments are consistent with the terms of the collective bargaining agreement, law and regulation, including the Federal Travel Regulations.

____
(Activity)

Dated:________________ By. ________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VI, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, Texas 75202 and whose telephone number is (214) 767-4996.

APPENDIX

11.1 LIMITATION: Official time, travel expenses, and per diem granted by the Employer in this agreement will be given only to Union officials, stewards and union contract negotiators who are employees of the Employer. Solicitation of membership, the collection of dues, or other internal business of the Union shall be conducted during the non-duty hours of the employees concerned.

* * *

11.5 INFORMATION, BRIEFING OR ORIENTATION: The Employer agrees that Union representatives who are FHA employees shall be granted official time, ordinarily not to exceed sixteen (16) hours per person annually, up to 160 hours each year to receive information, briefing, or orientation relating to matters of mutual benefit to the Employer and the employee in the employee's capacity as labor organization representative. Prior approval of the program to be attended must be given by the Employer.

11.6 CONFERRING WITH MANAGEMENT: Union officers will be allowed a reasonable amount of official time to meet and confer with management officials.

* * *

11.8 AUTHORIZED OFFICIAL TIME: Union officers and officials, including stewards, shall be permitted reasonable time during working hours without loss of leave or pay to represent employees in accordance with this agreement. Use of official time will not be limited to the confines of the office of the employee but will allow the representative to travel in accordance with the needs of the individual case. Any travel and per diem incurred by a representative in such cases will be reimbursed by the Employer, in accordance with applicable travel regulations. The Union and the Employer will endeavor jointly to keep mileage and per diem expenses to a minimum.

(a) All negotiations and preparations therefore shall be conducted on official duty time. This shall include time to prepare and present matters to the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel.

(b) Reasonable time for receiving, investigating, preparing and presenting a complaint, grievance or appeal must necessarily depend on the facts and circumstances of each case -- e.g., number and nature of allegations, number and complexity of supporting specifics, the volume of supporting evidence, availability of documents and witnesses and similar considerations.

(c) Reasonable time for preparations of information reports required under 5 USC § 7120 (c), including financial reports and trusteeship reports, shall be accorded to Union officials. The amount of time granted will be that necessary to gather data and complete reports. Management and Union will accept mutual responsibility to properly record this time on the Time and Attendance Reports.

*U.S. G.P.O. 1987-181-223:60002

9/Case 414

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 414 REPORT OF CASE DECISIONS December 23, 1986

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UNFAIR LABOR PRACTICE CASES

24 FLRA No. 72 (December 22, 1986)

United States Army Adjutant General Publication Center, St. Louis, Missouri and American Federation of Government Employees, AFL-CIO, Local 2761, Case No. 7-CA-40547

24 FLRA No. 73 (December 22, 1986)

Veterans Administration, West Los Angeles Medical Center, Los Angeles,California and American Federation of Government Employees, Local 3943, AFL-CIO, Case No. 8-CA-50393

24 FLRA No. 74 (December 22, 1986)

U.S. Department of Labor, Occupational Safety and Health Administration and National Council of Field Labor Locals, American Federation of Government Employees, Local 644 AFL-CIO, Case No. 2-CA-40440

24 FLRA No. 75 (December 22, 1986)

Veterans Administration, Medical Center, Phoenix, Arizona and American Federation of Government Employees, Local 2382, AFL-CIO, Case No. 8-CA-50153

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Federal
Labor Relations
Authority

24 FLRA No. 72

Army Adjutant General, Publication Center, St. Louis, Mo. and AFGE, Local 2761
(Decided December 22, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(5)	7103(a)(14)
CONDITIONS OF EMPLOYMENT	7106(a)(2)(B)
CONDITIONS OF EMPLOYMENT	7116(a)(1) and (5)
CONSIDERATIONS IN DECIDING IF A MATTER INVOLVES A C.O.E.	
NATURE AND EXTENT OF THE EFFECT ON WORKING CONDITIONS	
WHETHER MATTER PERTAINS TO BARGAINING UNIT EMPLOYEES	
RECREATIONAL ACTIVITIES DURING DUTY HOURS	
PICNICS	

DIGEST NOTES

The activity's annual picnic that was held for 18 years and involved all employees was not a condition of employment within the meaning of 7103(a)(14). Although the picnics involved bargaining unit employees, the Authority held, contrary to the Judge, that the annual picnics principally involved recreational activities and hence there was no direct connection to the work situation or employment relationship. The fact that the last three annual picnics were held during duty hours and awards were given out at the picnics does not establish a direct connection with the employment relationship. Accordingly, the activity did not violate section 7116(a)(1) and (5) for cancelling the annual picnics following discussions of the union objections to changes in the format of the picnics. (majority opinion)

In a dissenting opinion, one Authority Member stressed that the agency picnics was not merely a "recreational" activity for employees; it served a function that directly enhanced the employment relationship between the agency and employees. For the 3 years immediately preceding the agency's termination of its practice, the agency picnic was held on agency property during working hours. The picnics brought together agency employees and retirees, their families and guests. The agency not only hosted

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the event and encouraged employees to attend, but also took advantage of the occasion as an opportunity to distribute letters of appreciation, safety pins, and monetary awards. In comparison, other types of interruptions in the workday, such as breaks and rest periods during which employees are temporarily relieved from their particular duties but continue to be paid, have been considered conditions of employment. (dissenting opinion)

Federal
Labor Relations
Authority

24 FLRA No. 73

VA West Los Angeles Medical Center, Los Angeles, Cal. and AFGE, Local 3943, Case No. 8-CA-50393 (Decided December 22, 1986)

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(5)
  FACILITIES, EQUIPMENT AND SERVICE
COLLECTIVE BARGAINING PROCESS AND THE DUTY TO BARGAIN
  MORE THAN A DE MINIMIS CHANGE IN CONDITIONS OF EMPLOYMENT
    CRITERIA FOR A CHANGE TO BE MORE THAN DE MINIMIS
      NUMBER OF BARGAINING UNIT EMPLOYEES AFFECTED
      TEMPORARY, RECURRING OR PERMANENT NATURE OF THE CHANGE
      NATURE OF THE CHANGE
FACILITIES, EQUIPMENT AND SERVICES
  COFFEE BREAK / REST PERIOD AREA
    NURSES' WORK-BREAK ROOM
HEALTH AND SAFETY
  NURSE WORK-REST AREA
    IMPACT OF LOCATION ON PATIENT CARE
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  BARGAINING ORDER AND/OR NOTIFY UNION OF CHANGES
    APPROPRIATE ARRANGEMENTS AND/OR PROCEDURES

STATUTE

7106(b)(1), (2) and (3)
7116(a)(1) and (5)

DIGEST NOTES

The hospital's decision to relocate the cardiology nurses' work-break room significantly affected the nurses' ability to provide the best patient care in a situation where staffing levels were already characterized as dangerously short. The foreseeable result of the change was that nurses would forego breaks in order to remain in the patient care area and be available in case an emergency situation should arise. This is true due to their professional pride and concern for patient care although the nurses are not held responsible by the hospital for unforeseen occurrences. The change in the work-break area was permanent and disrupted the work routine. Thus, contrary to the Judge, the Authority concluded that the change was more than *de minimis* and the agency was obligated under section 7106(b)(2) and (3) to bargain with the union concerning the impact and

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implementation of its decision. Accordingly, the activity violated section 7116(a)(1) and (5) by making the change without bargaining with the union over its implementation and its impact on unit employees.

The number of employees affected by the change in the cardiology nurses' work-break area does not render the impact of the change less substantial or classify the matter of the as too insignificant for negotiation. The twenty-two employees (out of a unit of 384) were subject to a substantial change in working conditions. The change altered the efficiency of their operations and added new pressures and concerns.

Federal Labor Relations Authority

24 FLRA No. 74

Dept. of Labor, Occupational Safety and Health Administration and National Council of Field Labor Locals, AFGE, Local 644, Case No. 2-CA-40440 (Decided December 22, 1986)

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(5)
  - HEALTH AND SAFETY
- APPROPRIATE ARRANGEMENTS
  - ASSIGNMENT OF ADMINISTRATIVE DUTIES
- COLLECTIVE BARGAINING PROCESS AND THE DUTY TO BARGAIN
  - CONDITIONS OF EMPLOYMENT, CHANGES IN
    - MORE THAN A DE MINIMIS CHANGE
      - CRITERIA
        - NATURE OF THE CHANGE
        - TEMPORARY, RECURRING OR PERMANENT CHANGE
- HEALTH AND SAFETY
  - CHANGES IN CONDITIONS OF EMPLOYMENT AFFECTING HEALTH OR SAFETY
    - ASSIGNMENT OF ADMINISTRATIVE DUTIES TO INDUSTRIAL HYGIENISTS
- PROCEDURES, MANDATORY SUBJECTS OF BARGAINING [7106(b)(2)]
  - ASSIGNMENT OF ADMINISTRATIVE DUTIES
- UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  - STATUS QUO ANTE
    - NOT APPROPRIATE OR WARRANTED
      - ACTION / POLICY HAS BEEN TERMINATED / RESCINDED
  - BARGAINING ORDER AND/OR NOTIFY UNION OF CHANGES
    - APPROPRIATE ARRANGEMENTS AND/OR PROCEDURES
- UNITED STATES CODE
  - 29 U.S.C. 651 ET SEQ. [OSHA]

STATUTE

7116(a)(1) and (5)
7118

DIGEST NOTES

The assignment of administrative duties to several industrial hygienists (IH), who normally conduct industrial hygiene inspections in a variety of work places to determine compliance with the Occupational Safety and Health Act (OSHA), 29 U.S.C. 651 et seq., constituted more than a de minimis change in conditions of employment that gave rise to a duty to bargain. Although the one month assignments, which were rotated among the

IHs, ended about a half year following their implementation at which time another full time employee was hired to perform the administrative duties, the duration of the change was initially indefinite. The change required employees to perform new duties and required employees to spend an extended period, which had never been required before, performing functions not directly related to their case investigations. The potential adverse effect was on training, leave, and promotional opportunities, and also decreased the time for employees to accomplish their normal inspection duties. Because the activity implemented the change without notifying the union and bargaining with it over the impact and implementation of the change, the activity violated section 7116(a)(1) and (5).

A Status Quo Ante remedy was not warranted and would be meaningless where the activity discontinued its practice that violated the Statute prior to the hearing in the case. Rather a prospective bargaining order fully remedied the refusal to bargain violation.

Federal Labor Relations Authority

VA Medical Center, Phoenix, Ariz. and AFGE, Local 2382, Case No. 8-CA-50153 (Decided December 22, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(5)	7103(a)(10) and (11)
OFFICIAL TIME	7116(a)(1) and (5)
OFFICIAL TIME	7118
AMOUNT	7131(b) and (d)
NEGOTIABLE UNDER 7131(d)	
PAST PRACTICE	
UNION SECRETARIAL DUTIES	
WAIVER OF RIGHTS	
WAIVER, GENERALLY	
WAIVER MUST BE CLEAR AND UNMISTAKABLE	

DIGEST NOTES

The activity violated section 7116(a)(1) and (5) by unilaterally changing a practice of permitting employees who occupied the position of Union Secretary to perform representational duties on official time. When the union desired duty time for work or labor-management matters, the union followed the practice of requesting such from the union official's supervisor on a case by case basis. In the case of the union secretary, the union requested and received permission for the union secretary to perform representational work at the union office on official time. Such work was not internal union business under section 7131(b) [which does not apply to activities of a labor organization which involve an "interface" with management such as negotiations, grievances, negotiability disputes, and unfair labor practices.]. The amount of official time is a negotiable matter. When the activity unilaterally denied the union secretary official time, contrary to the established practice, it violated section 7116(a)(1) and (5).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES ARMY ADJUTANT GENERAL
PUBLICATION CENTER, ST. LOUIS, MISSOURI

Respondent

and Case No. 7-CA-40547

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2761

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent to the attached Decision of the Administrative Law Judge. The Judge concluded that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when it unilaterally cancelled the annual picnic. The issue before the Authority is whether, in the circumstances of this case, the annual picnic constituted a condition of employment giving rise to an obligation to bargain.

II. Background

The facts of this case as set out by the Judge are not in dispute and therefore will only be summarized below. The Union is the exclusive representative of employees of the United States Army Adjutant General Publication Center, St. Louis, Missouri (the Center). For at least 18 years picnics have been held for Center employees. Prior to June 1981, the majority of these picnics were held on weekends off the Center's premises. In June 1981 the picnic was held on the Center's premises during working hours to celebrate the Center's 30th anniversary. The picnics of 1982 and 1983 were also held on the Center's premises during working hours. Each of these three picnics followed similar arrangements. The work force reported for duty at the regular time. Those attending the picnic were released from their duties between 10:00 a.m. and 12:00 noon. Dependents, retirees and friends were permitted to attend as guests and to participate in an open house tour of the Center. Various activities occurred during the day, including the serving of food and refreshments, games, tours and movies. Part of the time was also set aside to recognize deserving employees with letters of appreciation, safety pins, and monetary awards.

Planning began for the 1984 picnic, which was scheduled for June 29th. Several disagreements arose between the Union and the Center's representatives over the wording of the Newsletter to be distributed to employees announcing the picnic. Specifically, the Union objected to the picnic's proposed format which, among other things, required those not participating to "fulfill their daily 8 hour work obligation or take annual leave." It is undisputed that employees not attending the previous picnics were supposed to be at their work stations. The Union chose to survey employees to see if they wanted to participate given these circumstances.

During management discussions of the Union's objections to the changes in format of the picnic, the Center decided to cancel the picnic entirely. This was accomplished without further discussion with the Union, in the daily bulletin notice to employees, dated June 8, 1984. The announcement stated that the picnic was cancelled as a result of discussions with the Civilian Personnel Office concerning administrative leave. A copy of the bulletin was sent to the Union, and the Union made no request to bargain after receipt of the bulletin.

III. Judge's Decision

The Judge concluded that the Respondent violated section 7116(a)(1) and (5) when it unilaterally cancelled the annual picnic. The Judge found that the annual picnic, having been held for three consecutive years during work hours against a backdrop in which picnics had been held for nearly 20 years, constituted an established past practice. The Judge also found that the annual picnic was, in the circumstances of this case, a condition of employment because it was arranged by management, used by management to award and recognize worthy employees, and authorized by management to be held on duty time. Finally, the Judge found that, based on its impact on employee morale, the cancellation of the picnic had more than a de minimis impact on the bargaining unit employees. In response to the General Counsel's request for a status quo ante remedy, the Judge concluded, in granting the request, that the cancellation "appears to interfere with no statutory management right." The Judge also concluded that it was unnecessary to resolve other issues raised by the parties concerning whether the holding of the picnic and certain of its functions involved violations of Agency regulations.

IV. Respondent's Exceptions

The Respondent excepted to the Judge's conclusion that the annual picnic held on duty time was a condition of employment. In this connection, the Respondent repeated arguments made to the Judge in which it contended that holding a picnic involved neither an established past practice nor a condition of employment, because, among other reasons, most of the previous picnics were held on weekends outside of the Respondent's grounds and the principal activities engaged in at the picnics involved the consumption of food and alcoholic beverages and participation in games. In the Respondent's view, those activities had no direct relationship to the work situation and hence did not involve conditions of employment.

Finally, the Respondent excepted to the Judge's recommended Order, contending that reinstituting the practice would interfere with its right to assign work under section 7106(a)(2)(B) of the Statute. Additionally, it argued that the Judge's recommendation would require it to violate Federal Personnel Manual requirements with respect to granting administrative leave.

Neither the General Counsel nor the Union filed an opposition to the Respondent's exceptions.

V. Analysis

We conclude, in agreement with the Respondent and contrary to the Judge, that the annual picnic does not meet the definition of conditions of employment in section 7103(a)(14) of the Statute and hence the Respondent's cancellation of the picnic did not give rise to an obligation to bargain on its part.[1]

There are two basic considerations involved in deciding whether a matter involves a condition of employment: (1) whether the matter proposed to be bargained pertains to bargaining unit employees; and (2) the nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees. Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA No. 23 (1986). As to the second consideration, there must be a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees.

Applying the Antilles analysis to the matters at issue in this case, it is clear that the first consideration is satisfied. The annual picnic involved all employees of the Respondent including bargaining unit employees. Therefore, its cancellation pertains to bargaining unit employees.

However, with respect to the second consideration, we find that the annual picnic principally involved recreational activities and hence had no direct connection to the work situation or employment relationship. We cannot agree with the Judge that because the picnic was held during duty hours and awards were given out, a direct connection with the employment relationship was established. Accordingly, the picnic was not a condition of employment, and the cancellation of an annual celebration involving essentially recreational activities does not constitute a change in conditions of employment.[2] Therefore, it is unnecessary to consider the other issues addressed by the Judge in her Decision.

---

[1] Member Frazier's separate opinion is set forth, infra.

[2] Compare Department of the Army, Fort Greely, Alaska, et al., 23 FLRA No. 105 (1986), wherein a direct connection was established between the granting of exchange privileges to employees and the work situation because the privileges were used as an incentive to working in an isolated location, and Department of the Army, Dugway Proving Ground, Dugway, Utah, 23 FLRA No. 80 (1986), wherein a connection was established between the providing of housing to employees and financial and recruiting benefits as well as hours of work involved.

While such matters do not give rise to a statutory obligation to bargain, it is our view that they are matters which the parties should be able to resolve between themselves without resorting to the unfair labor practice process. We urge representatives of agency management and unions to resolve this type of dispute bilaterally without the need to invoke statutory third-party processes.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings made by the Judge at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. We have considered the Judge's Decision, the Respondent's exceptions and the entire record, and conclude that the Judge's Decision must be reversed. We therefore conclude that the Respondent did not violate section 7116(a)(1) and (5) of the Statute based on its unilateral cancellation of the annual picnic. Accordingly, the complaint shall be dismissed in its entirety.

ORDER

The complaint in Case No. 7-CA-40547 is dismissed.

Issued, Washington, D.C. December 22, 1986.

Jerry L. Calhoun, Chairman

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

Member Frazier, concurring in part and dissenting in part.

I respectfully dissent from my colleagues on whether the matter in this case involves a condition of employment. I would find that it does. I agree with my colleagues that the facts of this case satisfy the first factor set forth in the Antilles Consolidated Education Association case, 22 FLRA No. 23; that is, that the matter pertains to bargaining unit employees. However, contrary to my colleagues, I would find that the facts also satisfy the second Antilles factor, which concerns the nature and extent of the effect of the matter on working conditions of the employees involved. The agency picnic was not merely a "recreational" activity for employees; it appears to have served a function that directly enhanced the employment relationship between the agency and its employees. Picnics for agency employees had been held for almost 20 years. These picnics took place in a variety of settings, occasionally on agency premises or during working hours. For the 3 years immediately preceding the agency's termination of its practice, the agency picnic was held on agency property during working hours. The picnics brought together agency employees and retirees, their families and guests. The agency not only hosted the event and encouraged employees to attend, but also took advantage of the occasion as an opportunity to distribute letters of appreciation, safety pins, and monetary awards. In short, the agency's presence permeated the event, and the employment relationship between the agency and its employees was undeniably and directly enhanced as a result. Furthermore, to find that an agency picnic held on agency premises during working hours falls within the compass of employees' conditions of employment is consistent with precedent. Other types of interruptions in the workday, such as breaks and rest periods during which employees are temporarily relieved from their particular duties but continue to be paid, have been considered conditions of employment. E.g., American Federation of Government Employees, AFL-CIO, Local 3511 and Veterans Administration Hospital, San Antonio, Texas, 12 FLRA 77, 84-88 (1983) (Union Proposal 30).

Having initially chosen to establish an annual picnic, and having utilized the picnic to enhance relations between it and its employees, the agency did not thereafter possess unfettered discretion to unilaterally terminate the practice. At the very least, the agency was obligated to inform the Union of its intention to change its past practice pertaining to such conditions of employment and give the Union a reasonable opportunity to request bargaining on proposals related thereto and otherwise consistent with law and regulation.

In these circumstances, I would find that the agency committed an unfair labor practice when it unilaterally cancelled the agency's annual picnic, thereby terminating a past practice pertaining to conditions of employment.

Henry B. Frazier III

Henry B. Frazier III, Member

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

UNITED STATES ARMY ADJUTANT GENERAL
PUBLICATION CENTER
ST. LOUIS, MISSOURI,

Respondent

and

Case No.: 7-CA-40547

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2761,

Charging Party

. . . .

Major Edelbert F. Phillips,
Howard S. Bishop, Jr.,
For the Respondent

Daniel Minahan,
For the General Counsel
Federal Labor Relations Authority

Dominic Licavoli
For the Charging Party

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

A charge of an unfair labor practice was filed by the Union on June 11, 1984 and amended on July 10. The General Counsel of the Federal Labor Relations Authority (hereinafter, the "Authority") investigated and, on July 31, served the complaint initiating this proceeding.

The complaint alleges that Respondent violated Sections 7116(a)(1) and (5) of the Statute[1] by unilaterally cancelling the annual picnic, held during working hours.

Respondent admits cancelling the picnic without providing prior notice to the Union, or an opportunity to bargain. Respondent denies that its action changed a condition of employment of unit employees, or terminated a past practice, or constituted a violation of the Statute.

A hearing on the matter was held on September 17, 1984 in St. Louis, Missouri. The parties appeared, examined witnesses, and adduced documentary evidence. Briefs were filed on November 13 on behalf of the General Counsel and Respondent, pursuant to an order of October 16 extending the briefing time to that date, upon a request of the General Counsel which was subject to no objection.

Findings of Fact[2]

1. The Union is and has been a labor organization within the meaning of Section 7103(a)(4) of the Statute, at all times material herein, and that for this same period the Respondent is and has been an agency within the meaning of Section 7103(a)(3).

2. At all times material herein, the Union has been recognized by Respondent as the exclusive representative of all employees assigned to the U.S. Army Adjutant General Publications Center, St. Louis (AGPC or the Center) with certain exceptions not here applicable. There are approximately 150 bargaining unit employees.

---

[1] Section 7116 provides, in pertinent part that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; [or]. . .
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter. . . .

[2] Abbreviations to be used herein are as follows. "Tr." refers to the transcript. Corrections to it are attached to this decision and are made pursuant to 5 CFR 2423.19(r). "G.C. Ex." refers to the exhibits of the General Counsel and "R. Ex." to those of Respondent. "G.C. Br." refers to the brief of the General Counsel and "R. Br." to that Respondent.

3. At all times material herein, the parties have been bound by a collective bargaining agreement.

4. At all times material herein, Lt. Colonel Joseph York has occupied the position of Commander of AGPC, and Major James K. Pualoa the position of Executive Officer of AGPC; and they are and have been management officials or supervisors within the meaning of Sections 7103(a)(10) and/or (11) of the Statute, and agents of Respondent.

5. The Center's facility consists of a single building on a seven-acre site surrounded by open grass.

6. Picnics have been held for Center employees for at least 18 years. Some were held in parks and, now and then, on the premises of the facility. Some were held during working hours; but most were held on weekends. In June 1981, to celebrate the 30th anniversary of the founding of the Center, the Commander authorized a picnic to be held during working hours, at the Center. Another such picnic was held in 1982 and 1983.

7. The 1981, 1982 and 1983 picnics followed the same arrangements. The work force reported for duty at its regular time, 0600 hours for the biggest percentage. An open house tour for dependents began at 0900 hours. Employees who wished to return home to pick up their dependents were released from duty on or about 1000 hours, with exceptions for those living a great distance from the Center. Opening ceremonies began at approximately 1115 hours. The warehouse area closed its doors at approximately 1200 hours. The front gate closed at 1700 hours. Games and movies were arranged for the participants at the picnic. Guests included retirees as well as dependents and friends of the employees. A tow motor was hooked to three carts and used to transport people around the site. Ceremonies were held to recognize deserving employees. Letters of appreciation, safety pins, and monetary awards for sustained superior performance and suggestions were given out to those employees earning them. Food and beer were served, for which the participants paid.

8. The Union was always consulted about the picnics, by the Center's Executive Officer normally, to find out if it could get some employees to help with the cooking and ticket taking, and to obtain advice as to what games employees would like. The Union paid for its members' tickets.

9. In 1984, plans got underway for the annual June picnic. On May 25, Lt. Colonel York sent the union President a copy of a Picnic Newsletter to be distributed to employees on May 29. The purpose was to obtain necessary information for the "1984 annual picnic" to be held on June 29. G.C. Ex. 23. In his letter to the Union, Lt. Colonel York referred the Union to Major Pualoa, if it had any questions. The union President got together with the stewards and Major Pualoa "due to the fact that there were several changes in the picnic newsletter" (Tr. 41). The "sore points" were the second and third paragraphs of the proposal newsletter which read:

> All picnickers are to come to work with their families by 8:30 a.m. Dismissal will be at 1:30 p.m. There will be cookies and coffee served at 9:00 a.m. in the cafeteria. We will begin serving lunch at 11:00 a.m.
>
> Personnel who choose not to participate in BINGO, VOLLEYBALL, SOFTBALL, TENNIS, CHILDREN'S GAMES nor indulge in BARBEQUE, HOMEMADE DESSERTS, SODA AND BEER, will fulfill their daily 8 hour work obligation or take annual leave.

See G.C. Ex. 23. It was undisputed that employees were not required to attend the 1981, 1982, and 1983 picnics but, if they did not, they were supposed to be at their work station. See Tr. 56.

10. The Union surveyed the Center's personnel and its then President "came to the conclusion that no one really wanted to participate in something like this if this -- with this type of -- I should say they were being told that if they didn't participate in this manner that they would have to work the eight hours or take the eight hours annual" (Tr. 42 and see also Tr. 50). By the time the union President had "gotten all the information gathered," he learned that the picnic had been cancelled (Tr. 42).

11. The information-gathering had to do with the signing, on June 7, 1984, of an unfair labor practice, alleging that management made a "unilateral change of past practices of employees' picnic." See G.C. Ex. 1a. Lt. Colonel York got together with his labor-management relations specialists, to deal with the unfair labor practice charge, and was told that the holding of the picnic during duty hours violated regulatory requirements.[3] He investigated and was satisfied that he could "not

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[3] The regulations relied upon are those in the Federal Personnel Manual. See G.C. Br. 4, page 2, concerning excused absence and stating, under S11-5 Administrative Discretion, that:

> Absences from regularly assigned duties in connection with the activities outlined below are considered constructive duty time; that is, activity commanders are authorized to excuse any employee without charge to leave or loss of pay to the extent indicated in each case.

Picnics are not included among the activities outlined in the regulation. On March 11, 1985, the Authority ruled that S11-5 does not limit administrative leave to only those situations enumerated in the Manual. See American Federation of Government Employees, AFL-CIO, National Council of Field Labor Locals, 17 FLRA No. 24 (1985).

grant administrative leave for those type functions" (Tr. 57), that employees could "not drink during duty hours" (Tr. 58), and that he "would be pecuniarily liable for the children and the wives that were taking the -- walking throughout the Center with all this material handling equipment running about" (Tr. 58). Plus this, the Center's workload was very heavy during around the time of the picnic and he had had to bring in "overhire" personnel to help process the backload (Tr. 58). Based on these beliefs, Lt. Colonel York decided to cancel the picnic. Accordingly, he included in the daily bulletin notice to employees, dated June 8, 1984, the announcement that: "As the result of discussions with CPO concerning administrative leave, the Center's picnic on 29 June 84 is cancelled" (G.C. Ex. 24). A copy was sent to the Union.

12. Lt. Colonel York conceded that holding picnics and recreational events can be seen as beneficial to morale at the Center and that at the Center "[w]e try to do that, yes" (Tr. 70). But he added that "most of the time they're after duty hours" (Tr. 70).

13. The Union made no request to bargain after receiving the June 8 bulletin.

14. Retirees and families and friends were "very, very disturbed" about cancellation of the picnic in which they had participated in prior years (Tr. 44). The employees were "upset," also, at the cancellation of the picnic (Tr. 51). According to the then union President, the cancellation had a "great impact" on morale at the Center (Tr. 51). Employees felt that they had "been cheated out of a good relationship between management and employees" and missed the participation with then families and friends in coming "aboard to see their working facilities as well as to participate in -- in having a good time together" (Tr. 52).

Discussion and Conclusions

The General Counsel has established, by a preponderance of the evidence,[4] that Respondent violated Sections 7116(a)(1) and (5) when it unilaterally cancelled an annual picnic which had been held for the past three years, during working hours.

1. Respondent correctly argues that the duty to bargain, under the Statute, extends only to "conditions of employment." See R. Br. 3-8. But it incorrectly argues that an annual picnic, sponsored by Respondent and held during working hours for the past three years, is not such a condition.

While there is no statutory right to an annual employee picnic, the law is settled that any benefit given to employees over an extended period of time with the knowledge and consent of responsible management officials ripens into a condition of employment. United States Department of the Treasury, Internal Revenue Service, Des Moines District, 13 FLRA 296, 307 (1983). Such an established practice may not be cancelled without affording the exclusive representative prior notice and an opportunity to bargain. Admittedly, the Union here had no such notice or opportunity. And, clearly, the annual picnics at the Center were an established practice at the time they were cancelled. They had been held intermittently for nearly 20 years. Starting in 1981, the picnics were held consistently each year for three years; and another picnic was scheduled for 1984. Each picnic since 1981 was held to commemorate the founding of the Center. Each picnic since 1981 has been held during working hours. Responsible management officials were not only aware of the picnic, they actually set the dates; announced the arrangements for each picnic in Center publications; and encouraged employees to attend. Contrary to Respondent's assertion that the annual picnic was a mere "social event" (R. Br. 3, such picnics were used by management as occasions upon which to award and recognize worthy employees, in the presence of their friends and families. They were used as morale builders. They promoted a good employment relationship which leads, in turn, to a more productive workforce.

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[4] This is the statutory burden of proof. See 5 U.S.C. 7118(a)(7) and (8).

Several Authority cases under the Statute are cited by Respondent -- all distinguishable in that they concern purely recreational and social opportunities and/or off--duty activities. See R. Br. 4-5 citing National Federation of Federal Employees, Local 1363 and United States Army Garrison, Yongsan, Korea, 12 FLRA 635 (1983) and 12 FLRA 665 (1983), wherein the Authority reviewed the negotiability of union proposals and ruled that the dispensation of alcoholic beverages in membership clubs had "no direct relationship to the work situation and the employment relationship of unit employees" (12 FLRA at 636); American Federation of Government Employees, Local 225, and U.S. Army Armamant, Research and Development Command, Dover, New Jersey, 11 FLRA 630 (1983) wherein the Authority held nonnegotiable a union proposal for access to picnic area and recreational activities on the ground that it "did not concern matters which are 'conditions of employment'" (id. at 631) and nothing in the proposal indicated that picnics or recreation were to be provided during working hours to serve any managerial interests. International Association of Fire Fighters, AFL-CIO, CLC, Local F-116 and Department of the Air Force, Vandenberg Air Force Base, California, 7 FLRA 123 (1981), wherein the Authority ruled as nonnegotiable a union proposal to grant off-duty personnel, and their dependents, the right to hunt and fish on the Base, on the ground that, the union adverted to "no relationship between the recreational activities of off-duty employees and their dependents and employment as firefighters at the Base" (id. at 124). Unlike any of the above cases, this one deals with picnics arranged by management, used by management to award and recognize worthy employees, and authorized by management to be held on duty time.

More apropos are cases cited by the General Counsel. See G.C. Br. 5-7. Thus, in Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA 229, 240 (1982, hereinafter, SSA) it was held that an agency violated the Statute when it unilaterally cancelled an established practice which permitted employees to hold retirement receptions and catered luncheons during authorized luncheon periods. See also Veterans Administration Medical Center, Bath, New York and Veterans Administration, Washington, D.C., 12 FLRA 552, 553 (1983), wherein it was held that the agency violated the Statute when it unilaterally changed the practice of providing a noon meal to physicians on duty. See also United States Army Air Defense Center and Fort Bliss, Fort Bliss, Texas, 12 FLRA 719, 720, 726 (1983), wherein it was held that a practice which allowed firefighters to wash their cars while at work had ripened into a condition of employment.

The rationale of these cases appears to be that practices authorized by management during working hours and which boost employee morale, concern or affect their conditions of employment. By the same token, the adverse impact on employee morale caused by the cancellation of the practices is an impact sufficient to trigger the duty to bargain.

2. Respondent argues to the contrary, that cancellation of the annual picnic was a *de minimis* matter. See R. Br. 8-9. There was undisputed testimony that the employees felt cheated out of a good relationship with management by the cancellation and missed the opportunity to have their families and friends come to the Center to see where they worked. The union President testified that the cancellation had a great impact on employee morale. For one thing, the cancellation denied those receiving awards the pride in having their families and friends witness recognition of their achievements, as workers at the Center. Under the circumstances, the cancellation of the picnic had more than a *de minimis* impact on the unit employees.

Respondent states that the unit employees were not interested in attending the picnic. See R. Br. 8 and finding 10, above. In fact, the employees resented the unilateral changes which management had made in past practices concerning the picnic, including the fact that they would not be able to drive home to pick up their families, but would have to bring them to work with them. Most employees start work at 6:00 a.m., making it very difficult for them to assemble their families at such an early hour.

3. Respondent argues that there was no established past practice of holding picnics on duty time at the Center, and that three years is too short a period in which to establish such a practice. See R. Br. 7-8.

This argument is rejected. The most recent picnics were held against a backdrop of picnics which occurred both during and after working hours for at least 18 years. Second, an annual picnic by definition occurs only once a year. Three annual picnics mean that the practice prevailed for three years, not an insignificant period of time. See Department of Defense Dependents Schools, 12 FLRA 43 wherein the Authority ruled that an agency could not unilaterally terminate a practice by which a union official had attended four annual labor relations conferences. The practice here was instigated by Respondent who, in 1984, referred to it as the "1984 annual picnic." See finding 9, above. The practice continued long enough that both employees and management considered it to be an annual event. In the one case cited by Respondent, Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA 413, 414, 419, 420 (1980), the Authority found a past practice of 16 months duration could not be unilaterally changed.

4. As a remedy, the General Counsel seeks a cease-and-desist order, a bargaining order, and an order to post an appropriate notice to employees. These are all proper, under the circumstances of this case, and will be recommended.

The General Counsel also seeks an order to restore the practice of holding the June picnics, pending negotiations with the Union. See G.C. Br. 12. The General Counsel points out that restoration of the status quo ante is appropriate when an agency has failed to meet its duty to bargain over the substance of a decision, "in order to avoid rendering meaningless the mutual obligation under the Statute to negotiate concerning changes in conditions of employment." U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 119 (1982). See also, Department of the Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA 674, 675 (1984).

Cancellation of the annual picnic, held during duty hours to honor employees, to celebrate the founding of the Center, and to promote morale appears to interfere with no statutory management right. See Section 7106 of the Statute.[5] See also the SSA case, 9 FLRA at 230 and 241 where the Authority required the agency to rescind and revoke a guide by which it had unilaterally changed established past practices with regard to retirement receptions, etc., even though the agency argued that "a critical work exigency existed" which justified the unilateral cancellation. Compare the Center's reliance, here, on a "very heavy" workload at the time of the unilateral cancellation (R. Br. 9). Accordingly, I will recommend an order that the status quo ante be restored.

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[5] 7106. Management rights.

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency --

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws --

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; . . .

(continued)

In view of the above conclusions and discussion, resolution of other issues raised by the parties is unnecessary including the argument of the General Counsel concerning applicable administration regulations. The Center does not appear to be asserting that holding the picnics violated regulations, only that Lt. Colonel York "reasonably believed" that they did. See R. Br. 11 and footnote 3 above.

(continued)

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted.

(C) with respect to filling positions, to make selections for appointments from —

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating -- . . .

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Ultimate Findings and Recommended Order

Respondent has violated and is violating Sections 7116(a)(1) and (5) by unilaterally cancelling the annual picnic, as alleged in the complaint.

Accordingly, and pursuant to 5 CFR 2423.29 and Section 7118 of the Statute, the Authority hereby ORDERS that the United States Army Adjutant General, Publication Center, St. Louis, Missouri, shall:

1. Cease and desist from:

(a) Changing conditions of employment of bargaining unit employees by terminating the practice of annually observing, during working hours, the picnic of the U.S. Army Adjutant General, Publications Center, St. Louis, Missouri, without first notifying the American Federation of Government Employees, AFL-CIO, Local 2761, the exclusive representative of unit employees, and affording it the opportunity, upon request, to bargain over such a change.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of the American Federation of Government Employees, AFL-CIO, Local 2761, reinstate the practice of annually observing, during working hours, a picnic.

(b) Post at the Center's facilities copies of the attached notice to employees, on forms to be furnished by the Regional Director, Region VII, Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Center and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take all reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

(c) Pursuant to 5 CFR 2423.30, notify the Regional Director, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: March 28, 1985
Washington, DC

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change conditions of employment of bargaining unit employees by terminating the practice of annually observing, during working hours, the picnic of the U.S. Army Adjutant General Publication Center, St. Louis, Missouri, without first notifying the American Federation of Government Employees, AFL-CIO, Local 2761, the exclusive representative of our unit employees, and affording it the opportunity, upon request to bargain over such a change.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce any employee in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the American Federation of Government Employees, AFL-CIO, Local 2761, reinstate the past practice of annually observing, during working hours, the picnic of the U.S. Army Adjutant General, Publication Center, St. Louis, Missouri.

____
(Agency or Activity)

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 1531 Stout Street, Suite 301, Denver, Colorado 80202, and whose telephone number is: (303) 844-5224; FTS 564-5224.

24 FLRA No. 73

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
WEST LOS ANGELES MEDICAL CENTER
LOS ANGELES, CALIFORNIA

Respondent

and Case No. 8-CA-50393

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3943, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the American Federation of Government Employees, Local 3943 (the Union). The complaint alleged that the Veterans Administration, West Los Angeles Medical Center (WLAMC or Respondent) violated section 7116(a)(1) and (5) of the Statute by eliminating the work-break area for cardiology nurses at the Wadsworth Hospital of the VA's WLAMC and by determining the location of the new work-break area without notifying the Union and providing it with an opportunity to bargain over the implementation of the change and the impact on unit employees.

II. Facts

AFGE Local 3943 represents nurses at VA's WLAMC. Under the parties' national agreement, the WLAMC is obligated to notify Holly Boyd, a Vice President of Local 3943, of any bargainable changes which occur within the Wadsworth

Hospital. As to such changes, bargaining is accomplished locally with the Wadsworth facility.

The dispute arose on May 17, 1985, when the Head Nurse cleared out Room 4214 to convert the room for exclusive use as her office. Room 4214 had been shared by staff nurses on the A/D Ward and the Head Nurse and used by the nurses to prepare reports and take 10-minute coffee breaks, two of which are allowed each day. The Chief of Nursing Services decided to convert Room 4214 to the Head Nurse's office after she assigned one Head Nurse to handle both the A/D and B/C Wards. The Chief Nurse did not know that the nurses were using the room for their breaks when she made this decision. The Chief Nurse designated Room 4236 as the new break area for the entire Wing and Room 4215/4218 (a conference room) as the work-report room for the cardiology ward nurses. The new break-room is not in close proximity to the patient care area and nurses on break cannot hear calls for assistance from fellow nurses in the A/D Wards, as they could when taking breaks in Room 4214.

Nurses on the A/D Wards must assist each other with the care of patients who have undergone cardiac catherization and in other life-threatening situations which require an emergency call for assistance and medication and rapid communication among health care personnel. Nurses on break are not responsible for unforeseen occurrences when they go off the ward for breaks. However, due to staffing shortages, the nurses often remain near their stations during lunchtime and rarely take their allowable coffee breaks.

Shortly after learning that Room 4214 was being reserved as a private office for the Head Nurse, Boyd sent her a memorandum, and demanded bargaining over the impact and implementation of the change. She asked that the change not be implemented until agreement was reached. On May 21, 1985, a meeting took place between Boyd, the Head Nurse, the Chief Nurse, and Dora Garcia, Respondent's Labor Relations Specialist. Respondent participated in this meeting not to negotiate, but to discuss Boyd's unhappiness over the change. During the meeting there was a discussion of possible alternate arrangements. Alleged agreements regarding the conversion of a tub room into the new work-break room were later denied by management and management refused to meet for the purpose of negotiating on the impact and implementation of the change. The nurses used

Room 4214 until May 30, 1985. On May 31, 1985, Boyd gave a memorandum to the Head Nurse, with copies to other management principals, to protest the change until the completion of bargaining over impact and implementation.

III. Administrative Law Judge's Decision

The Judge found that the change in work and break locations of the cardiology nurses did not change the nature of their duties, but made the performance of their duties less convenient and efficient. The change in the break room made the cardiology nurses less readily available to their patients and unable to respond to calls for assistance, should any emergency arise in their absence. The Judge found that while the cardiology nurses on break are not held responsible by the hospital for unforeseen occurrences, "their professional pride and concern for their patients nevertheless suffers when they must take a break under these circumstances." (Administrative Law Judge's Decision, at 18.) The Judge further found that the foreseeable effect of the change is that the nurses will be less inclined to take the rest breaks to which they are entitled, and which are commonly accepted as being of benefit to both employee and employer.

The Judge concluded, however, applying the factors in Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA No. 101 (1985), that the Authority would classify the changes as of a *de minimis* nature. The Judge noted that, at most, the changes affect 22 employees out of a unit of 384; involve only the location where the affected employees spend a relatively small percentage of the working time (at least 50 minutes a day); do not involve a change in classification, duties, pay or promotion potential; and do not deprive employees of a location in which to perform work and take breaks (only a less convenient and efficient one).

IV. Positions of the Parties

In its exceptions the Union argues that the Judge incorrectly held that (1) a test should be applied to the facts and circumstances of this case to determine whether there was a bargaining obligation; and (2) Respondent has not committed the unfair labor practices alleged in the complaint. The Union also asserts that the Judge relied on factors irrelevant to any such test and failed to invoke any presumption favoring impact and implementation bargaining. Finally, the Union excepts to the Judge's recommended order insofar as it recommended dismissal of the complaint and failed to provide any affirmative relief.

The General Counsel and the Respondent did not file submissions with the Authority.

V. Analysis

In Department of Health and Human Services, Social Security Administration, 24 FLRA No. 42 (1986), we reassessed and modified the *de minimis* standard previously used to identify changes in conditions of employment that require bargaining. We stated that in order to determine whether a change in conditions of employment requires bargaining, we would carefully examine the pertinent facts and circumstances presented in each case; and that in examining the record, principal emphasis would be placed on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment. We also stated that equitable considerations would be taken into account in balancing the various interests involved; that the number of affected employees and the parties' bargaining history would be given limited application; and that the size of the bargaining unit would no longer be applied.

Applying the revised standard to the facts and circumstances in this case, we conclude that the Agency was obligated under section 7106(b)(2) and (3) of the Statute to bargain with the Union concerning the impact and implementation of its decision to relocate the cardiology nurses' work-break room. The record reveals that the change significantly affected the ability of the nurses to provide the best patient care in a situation where staffing levels were already characterized as dangerously short. The foreseeable result of the change was that nurses would forego breaks in order to remain in the patient care area and be available in case an emergency situation should arise. The change in the work-break area was permanent and disrupted the work routine and it appears this change made the performance of duties less efficient.

Clearly these are just the kinds of problems that are best resolved through meaningful bilateral negotiations between the Union and the Agency and not by us. Participation by the nurses' representative in the selection of the new break-room could have resolved the dispute and prevented it from rising to this level. A balancing of labor and management's interests reveals that they both would benefit from meaningful negotiation on the most appropriate location of a work-break room. Mutual resolution of the problems presented by management's action will allow the nurses to perform their duties in the most efficient and effective manner and provide the Agency and patients with the highest level of patient care.

The number of employees affected by the change herein does not render the impact of the change less substantial or classify the matter as too insignificant for negotiation. The twenty-two employees (out of a unit of 384) were subject to a substantial change in working conditions. The change altered the efficiency of their operation and added new pressures and concerns.

Accordingly, we do not agree with the Judge's finding that the change in the work-break location did not impose a duty on the Agency to bargain with the Union concerning the impact of its decision. Considering the totality of the facts and circumstances presented on this record, we conclude that the Agency violated section 7116(a) (1) and (5) of the Statute by eliminating the work-break area for cardiology nurses at the Wadsworth Hospital of the VA's West Los Angeles Medical Center and by determining the location of the new work-break area without notifying the Union and providing it an opportunity to bargain.

VI. Conclusion

Pursuant to section 2423 of the Authority's Rules and Regulations and section 7118 of the Statute, we have reviewed the rulings of the Judge made at the hearing, find that no prejudicial error was committed, and thus affirm those rulings. We have considered the Judge's decision and the entire record, including the parties' contentions, and adopt the Judge's findings and conclusions only to the extent consistent with our decision.

We conclude that the Respondent violated section 7116(a) (1) and (5) of the Statute by eliminating the work-break area for cardiology nurses at the Wadsworth Hospital of the VA's West Los Angeles Medical Center and by determining the location of the new work-break area without notifying the Union and providing it an opportunity to bargain over the implementation of the change and the impact on unit employees.

ORDER

Pursuant to Section 2423.29 of the Authority's Rules and Regulations and Section 7118 of the Statute, it is hereby ordered that the Veterans Administration, West Los Angeles Medical Center, Los Angeles, California:

1. Cease and desist from:

(a) Unilaterally eliminating the work-break area for cardiology nurses at the Wadsworth Hospital of the VA's West Los Angeles Medical Center and by determining the location of the new work-break area without notifying the American Federation of Government Employees, Local 3943, AFL-CIO, the employees' exclusive bargaining representative, and providing it an opportunity to negotiate with respect to the procedures to be observed in implementing such change and appropriate arrangements for employees adversely affected thereby.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain with the American Federation of Government Employees, Local 3943, AFL-CIO, the employees' exclusive bargaining representative, with respect to procedures and appropriate arrangements for employees adversely affected by the change in the work-break area for cardiology nurses at the Wadsworth Hospital.

(b) Post at the Wadsworth Hospital of the Veterans Administration's West Los Angeles Medical Center, wherever bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief of Nursing Services and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places where Notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., December 22, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change conditions of employment by eliminating the work-break area for cardiology nurses at the Wadsworth Hospital of the Veterans Administration's West Los Angeles Medical Center and by determining a new work-break area, without first affording the American Federation of Government Employees, Local 3943, AFL-CIO, the employees' exclusive bargaining representative, an opportunity to negotiate with respect to the procedures to be observed in implementing the change and appropriate arrangements for employees adversely affected thereby.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, bargain with the American Federation of Government Employees, Local 3943, AFL-CIO, the employees' exclusive bargaining representative, with respect to procedures and appropriate arrangements for employees adversely affected by the elimination of the work-break area for cardiology nurses and the determination of a new work-break area.

____
(Activity)

Dated: ____________ By: ________________________
Chief of Nursing Services

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII, Federal Labor Relations Authority, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 894-3805.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

VETERANS ADMINISTRATION
WEST LOS ANGELES MEDICAL
CENTER, LOS ANGELES,
CALIFORNIA,

Respondent

and

Case No.: 8-CA-50393

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL
3943, AFL-CIO,

Charging Party

. . . .

Marco Gomez and
Dora Garcia,
For the Respondent

John R. Pannozzo, Jr.
For the General Counsel
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Pursuant to a charge of unfair labor practices filed on June 19, 1985 and amended on September 19, the Regional Director of Region 8 of the Federal Labor Relations Authority (hereinafter, the "Authority") investigated and, on September 27, 1985, served the complaint initiating this proceeding.

The complaint alleges that on or about May 17, 1985, Respondent changed the working conditions of unit employees by eliminating the work-break room for certain nurses, without first notifying the Charging Party (also referred to herein as the "Union" and "Local 3943"), and providing it with an opportunity to bargain over the implementation of the change and the impact on unit employees, in violation of Section 7116(a)(1) and (5) of the Statute.[1] The complaint further alleges that the same statutory provisions were violated when on or about June 17, 1985, Respondent determined the location of the new work-break room for certain nurses without completing bargaining with Local 3943, on behalf of the American Federation of Government Employees ("AFGE"), over the impact and implementation of the change.

Respondent denies that it has violated the Statute.

A hearing was held on November 19 and 20, 1985, in Los Angeles, California. The parties appeared, adduced documentary evidence, and examined witnesses. Briefs were filed by the Respondent on January 13, 1986, and by the

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[1] Section 7116 provides, in pertinent part, that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . [or]
> >
> > (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter. . . .

General Counsel on January 14, pursuant to a December 12, 1985, order extending the briefing time until January 14. Based upon the record made in this proceeding, my observation of the demeanor of the witnesses, and the briefs, I enter the following findings of fact and conclusions of law, and recommend the entry of the following order.

Findings of Fact[2]

1. At all times material herein, Respondent has been, and is now, an agency within the meaning of 5 U.S.C. 7103(a)(3).

2. The West Los Angeles Medical Center ("WLAMC") of the Veterans Administration ("VA") includes two separate hospital facilities -- one at Brentwood and one at Wadsworth. This case concerns the Wadsworth facility. Since 1979, Rowena Bishop has been the Chief of the Nursing Service at Wadsworth. Catherine Gloodt is the Head Nurse for Ward 4 East at Wadsworth.

3. At all times material herein, AFGE has been and is now a labor organization within the meaning of 5 U.S.C. 7103(a)(4).

4. Since on or about August 13, 1982, AFGE has represented certain VA employees. There are approximately 17,000 professionals in the unit. There is presently no nationwide professional contract. One is being negotiated and is in litigation over negotiability issues.

5. On January 7, 1985, a unit of nurses was included in the certified, national, consolidated, professional unit of VA employees represented by AFGE for the purpose of exclusive representation. Local 3943 is a constituent local of AFGE. No negotiations involving Local 3943 has taken place since certification.

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[2] The following abbreviations will be used in this decision. "TR." refers to the transcript. "G.C. Exh." refers to the exhibits of the General Counsel and "R. Exh." refers to those of Respondent. "G.C. Br." refers to the brief of the General Counsel and "R. Br." refers to that of Respondent.

6. Local 3943 represents nurses at VA's WLAMC, which is comprised of the two, separate facilities -- the Brentwood hospital has 151 bargaining unit employees and the Wadsworth hospital has 384. Local 3943 also represents 500 VA employees at its Long Beach Medical facilities and 250 at VA's Sepulveda facilities. Not all professionals in the unit are nurses. Prior to AFGE's certification, the nurses at these hospitals were represented by the California Nurses Association.

7. The WLAMC is obligated to notify Holly Boyd, a Vice-President of Local 3943, of any bargainable changes which occur strictly within the Wadsworth hospital, where she has worked as a nurse on the A/D Ward in the 4 East Wing for one year. As to such changes, bargaining is done locally, within the Wadsworth facility.

8. The Wadsworth hospital was constructed in 1977. Its 4 East Wing has four wards -- the A and D Wards which serve cardiology patients; the B Ward which serves hematology and oncology patients; and the B and C Wards which contain general medicine patients. The 4 East Wing is comprised of four squares, with the A and D Wards being located in the front of the wing separated by the receptionist's desk which faces the corridor leading from the elevators onto the wing. The B Ward is located behind the A Ward. The C Ward is located behind the D Ward.

9. Since the Wadsworth hospital was constructed, Room 4214, like similarly situated rooms on other wings, had been shared by staff nurses on the A/D Ward and the Head Nurse and used as a room in which the nurses prepared their reports and took their 10-minute coffee breaks, two of which are allowed a day. Room 4214 is located behind the receptionist's desk, is centrally located between the A and D Wards, and is convenient for the nurses on those wards and allows them to hear calls for assistance by other cardiology nurses. In Room 4214 were kept the on-call schedules of the doctors; staff schedules; discharge planning and daily patient reports; records and personal communications from the nursing office; cardiac catherization schedules; and a tape machine for giving "report". "Report" refers to a report given and received by nurses at the change of shifts; takes one-half hour to prepare by the outgoing nurse; and informs the incoming nurse of the needs and conditions of the patients. In Room 4214, the cardiology nurses not only gave report and took coffee breaks, but also completed care

plans, charts, and discharge plans for the patients. Room 4214 provided a convenient and quiet place for the nurses to work on these items. All of these reports, plans and charts are confidential in nature.

10. On May 17, 1985, Holly Boyd walked by Room 4214 and saw Head Nurse Gloodt clearing out papers and throwing things away. Head Nurse Gloodt explained to Ms. Boyd that she was moving out the nurses' things and, from then on, would have exclusive use of that room as her office. Head Nurse Gloodt was acting on orders of Rowena Bishop, the Chief of Nursing Services at Wadsworth. Chief Nurse Bishop made this decision because there would no longer be two Head Nurses on 4 East Wing. Head Nurse Gloodt was to administer both the A/D and B/C Wards (also called "Pods") (TR. 104) and be in charge of some 57 beds and 30 employees. Head Nurse Gloodt had been Head Nurse of B/C Ward on the 4 East Wing. Chief Nurse Bishop decided on this move because she felt that Head Nurse Gloodt needed a place where she could have privacy and a place where she could carry out her administrative duties without interruption. In Room 4214, Head Nurse Gloodt would be centrally located and adjacent to the central communication desk, the primary communication source for patient care. In Room 4214, Head Nurse Gloodt would be more identifiable as "being accountable for the total wing" (TR. 104). Chief Nurse Bishop did not know that the A/D Ward nurses were using Room 4214 for their breaks when she made this decision. Head Nurse Gloodt's office had been in Room 4236, which she shared with B/C Wards nurses who gave report and took their breaks in this room. As Head Nurse of both A/D and B/C Wards, Head Nurse Gloodt has to counsel and evaluate employees and follow up on patient-care complaints. In making this decision, Chief Nurse Bishop designated Room 4236 as the break area for the whole 4 East Wing, and Room 4215/4218 (a conference room which links Wards A and B) as the work-report room for the cardiology ward nurses.

11. Room 4236 measures 9.5 by 13 feet. Room 4214 measures 8.5 by 11.5 feet. Both have locked desks and file cabinets. Room 4236 is located on Ward B, down a long hallway from Room 4214 and around the corner in the rear of the 4 East Wing. It is 69 feet from Room 4214; 159 feet from the most remote area of Ward A, in contrast to 90 feet distance between Room 4214 and this area; and 183 feet from the most remote area of Ward D, in contrast to 114 feet distance between Room 4214 and this area. The cardiology

nurses on breaks in Room 4236 can not hear calls for assistance from fellow nurses in the A/D Wards, as they could when taking breaks in Room 4214.

12. Nurses on the A/D Wards must assist each other when patients who have undergone cardiac catherization begin to bleed from the femoral artery or from a major vessel. The procedure for stopping the flow of blood does not permit a cardiology nurse the opportunity to reach for a telephone since both hands must be used to place pressure on the artery or vessel. Cardiac catherizations occur one to three times daily at Wadsworth. Other life-threatening situations faced by nurses on the A/D Wards include a patient experiencing chest pain, which could be a myocardial infarction requiring an emergency call for assistance and medication, and a patient experiencing cardiac arrest, which requires rapid communication among health care personnel.

13. Nurses on break are not responsible for unforeseen occurrences. They are held responsible for changes in a patient's condition that the nurse was aware of prior to going on break or that the nurse was involved with in some way, or for treatment that was supposed to be administered and was not, and for not informing a colleague that the nurse is taking a break. When a nurse takes a break, another nursing personnel must be available. See TR. 155-156 and 166 where Chief Nurse Bishop so testified, and whose testimony I credit on this point.[3]

14. Nurses are allowed to go off the ward for breaks. However, due to staffing shortages, many times the nurses remain near their stations even during lunchtime and "rare[ly]" take their allowable coffee break (TR. 183). Most of the time, on the day shift, 3 nursing personnel care for the 25 beds on the A/D Wards, a situation regarded as "dangerously short" by the nurses (TR. 65).

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[3] I reject the testimony of Nurse Boyd that nurses are accountable for patient care while on breaks "because we're on paid time" (TR. 41). A supervisor of Chief Nurse Bishop's experience (30 years with some 6 years at Wadsworth alone) is more likely to know this than one of Nurse Boyd's experience (three years). There was no evidence of any instance of a nurse being held accountable for an unforeseen occurrence while on a break.

15. The conference room now being used by the A/D nurses to give report on the tape machine is also used for doctor and patient care conferences and by students and other hospital personnel. Scheduling conflicts sometimes interfere with the nurses giving report on the tape recorder. A transient couple removed and taped over confidential patient information since the move of the tape recorder to the conference room. This never happened while the tape machine was kept in Room 4214, although it too is kept unlocked.

16. The "morale" of the cardiology nurses, and their "dignity" suffered when they were "put out" of Room 4214 to make room for a private office for Head Nurse Gloodt (TR. 49). The nurses no longer have as private an area to complete discharge planning and patient care plans. These plans can be made at the nursing station and on the ward, but with less ease and efficiency. There is now the possibility of a breach of patient confidentiality since personnel matters are discussed within earshot of people randomly walking by the nurses. Also, the written materials used by the nurses in performing their duties, and formerly kept in Room 4214, are now to be found on three different bulletin boards.

17. On May 17, 1985, shortly after learning that Room 4214 was being reserved as a private office for Head Nurse Gloodt, Nurse Boyd sent her a memorandum, as Vice-President of Local 3943, and demanded bargaining over the impact and implementation of the change. She asked Head Nurse Gloodt not to implement the change until agreement was reached and asked for a reply by May 22.

18. On May 21, 1985, a meeting took place between Vice-President Boyd, Head Nurse Gloodt, Chief Nurse Bishop, and Dora Garcia, Respondent's Labor Relations Specialists. The purpose of Respondent in participating in this meeting was not to negotiate, but to discuss the unhappiness of Vice-President Boyd over the change. During the meeting there was a discussion of possible alternate arrangements for the nurses' report and break rooms, specifically use of Room 4261 (the tub room), as suggested by Vice-President Boyd.

19. On May 21, 1985, Head Nurse Gloodt sent a work order to the Engineering Service in which she asked for expedited service on making four changes to the tub room

-- install electrical outlets; dynamite floor drain; remove hand rail; and remove signs off doors. This work order was prepared on the instruction of Ms. Garcia.

20. On May 23, 1985, Vice-President Boyd prepared a memorandum of understanding to Ms. Garcia in which it was stated that the tub room, with certain modifications, would be used as the new report and break room instead of Room 4214.

21. At the parties labor-management meeting on May 28, 1985, Ms. Garcia referred to the May 23 memorandum and denied entering into any such agreement. She said that the tub room would not be so used.[4] She said that the nurses could make report out on the POD, at the nurses' station, or carry the tape recorder to an empty patient's room.

22. The cardiology nurses continued to use Room 4214 for report and discharge planning until May 30, 1985. They also continued to use it for breaks until about that time "but less and less" as the "atmosphere wasn't conducive to that" and they did not feel "comfortable in there any longer" (TR. 20). Head Nurse Gloodt began moving her belongings from Room 4236 into Room 4214 on May 17. On May 30, she moved the tape machine from the desk in Room 4214 into patient Room 1 on Ward A. On May 30, she also began locking the door to Room 4214 when she was not there.

23. From May 30, 1985, to June 17, 1985, the cardiology nurses usually used patient Room 1 as their report and break room. At times, to keep the room free, it was necessary to place a patient in the B/C Ward.

24. On May 31, 1985, Vice-President Boyd gave a memorandum to Head Nurse Gloodt, with a copy to Chief Nurse Bishop and Ms. Garcia to protest the change in report and break area for the cardiology nurses until the completion of

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[4] The Assistant Chief of the Engineering Service testified at the hearing and established that it would be unsafe to use the tub room for the occupancy of personnel on a continuous basis because it did not have a ready air supply. He established that it would take 10 days to make the modifications necessary to correct this defect, at a cost of between $6,400 - $7,200.

bargaining over the impact and implementation of the change. A discussion ensued in which Vice-President Boyd requested continued use of Room 4214 until the completion of bargaining. Head Nurse Gloodt stated that she had been told by Chief Nurse Bishop to make the change and that this had been approved by Ms. Garcia.

25. On June 5, 1985, Vice-President Boyd sent a memorandum to Chief Nurse Bishop, with a copy to Ms. Garcia, in which she complained about disruption of the work routine and morale of the cardiology nurses caused by the change in their work and break room; submitted four possible solutions; and asked for counterproposals within five days. Chief Nurse Bishop acknowledged receipt of the June 5 memorandum on June 10 and stated that the Labor Relations Section would provide appropriate responses.

26. On June 17, 1985, Ms. Garcia responded to Vice-President Boyd. In a memorandum, Ms. Garcia stated that, in an attempt to accommodate the concerns of Local 3943 about "the reoccupation of Room 4214 to its original designated purpose, which is that of a Head Nurse office" (G.C. Exh. 8), Room 4215/4218 (a conference room) "may be used for taping and receiving report with exception of those times it is reserved for conferences at which time other arrangements will be made" (G.C. Exh. 8) and that Room 4236 would be "designated as a break room on 4E b/c" (G.C. Exh. 8). Ms. Garcia gave the memorandum to Vice-President Boyd on June 17, at a meeting attended also by Chief Nurse Bishop. Ms. Garcia said that "that was what the arrangements were going to be and that there was not to be any further discussion about it, or bargaining" (TR. 27).

27. Local 3943 never received any counterproposals in response to its memorandum of June 5, 1985.

28. Chief Nurse Bishop never considered that management was bargaining with Local 3943 over the change in the work and break room of the cardiology nurses as she "did not see it as a change" (TR. 134 and see also TR. 146).

29. There are 9 to 10 registered nurses on the A/D Wards and 10 to 11 on the B/C Wards who "were affected by that change [the establishment of Room 4214 as the

Head Nurse's office and Room 4236 as the break room]" (TR. 164).

30. There was no evidence of any bargaining history or past practices according to which the parties have handled similar changes.

Discussion and Conclusions

The General Counsel does not contend that Respondent owed a duty to Local 3943 to negotiate "over the substance of its decision to select the rooms to be used for work and break" by nurses in the bargaining unit. See G.C. Br. 12. This is a right of management reserved to it by Section 7106(b)(1) of the Statute[5] and, of course, includes the right to make a wrong decision which the record indicates may have happened here.[6] While management may elect to bargain over Section 7106 (b)(1) rights, it did not do so here; and the General Counsel does not seem to contend otherwise. At most, Respondent listened to concerns expressed by the nurses and tried to alleviate them.

The rights which are at issue here are the rights of a labor organization to bargain with management over procedures management will observe in exercising its authority, and appropriate arrangements for employees adversely affected by the exercise of management authority -- so-called "impact and implementation" bargaining. See Section 7106(b)(2) and (3) of the Statute.[7]

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[5] Section 7106 provides, in pertinent part, that:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating -
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> > (1) at the election of the agency, on the . . . technology, methods and means of performing work. . . .

[6] Undoubtedly, the morale and dignity of hardworking nurses, tending seriously ill patients, were sacrificed by a change which seems to have accomplished comparatively little in the way of efficiency and much in the way of resentment. See findings 9-16, above.

Respondent admittedly did not bargain with Local 3943 over the impact and implementation of its decision to relocate the work and break areas of the nurses in the A/D Wards of its Wadsworth hospital and contends that such bargaining was not necessary because the change was _de minimis_ in nature. See R. Br. 4. If, indeed, the change was of a _de minimis_ nature, this Authority does not view bargaining as necessary under the Statute.

In measuring whether a change is _de minimis_ nature, the Authority carefully examines "the totality of the facts and circumstances presented in each case". _See Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois_ (hereinafter _DHHS_), 19 FLRA 827, 829 (1985). Among the factors considered are these:

> 1. The nature of the change as it affects or foreseeably affects unit employees, as individuals or as a whole (e.g., the extent of the change in work duties, location, office space, hours, employment, loss of benefits and/or wages, etc.);

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[7] Section 7106 provides, in pertinent part, that:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating - . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

2. The temporary, recurring or permanent nature of the change (i.e., the duration and the frequency with which it affects unit employees);

3. The number of unit employees affected or foreseeably affected by the change;

4. The size of the bargaining unit;

5. The extent to which the parties may have established, through negotiation or past practice, procedures and appropriate arrangements concerning analogous changes in the past.

See DHHS, 19 FLRA at 830 and 835. Such considerations "are not intended to constitute an all-inclusive list;" nor are they intended to be applied in a "mechanistic" manner. DHHS, id. at 830. Former Authority member William J. McGinnis, Jr. also considered a sixth factor, namely: "When would the implementation of the change involve or adversely affect unit employees." DHHS, id. at 835.

In DHHS, the change required employees at three branch offices to travel to State of Michigan offices in the course of performing their duties and was held to be de minimis by the Authority. It affected five or six employees out of a substantially larger number of employees in the bargaining unit. The work duties remained substantially the same. The State offices were only six or seven blocks to four miles away. The hours of work appeared to remain unchanged. The work environment in at least one office was similar to that of an SSA office. Employees were compensated for their travel expenses. The travel time totaled only one day, in one office, up to six days in another. The change was a short-lived and temporary one. And any past bargaining over similar changes was limited to consultation concerning the posting of new travel schedules. See DHHS, id. at 829. As to these factors, the Authority noted "particularly the slight nature of the changes; the short-lived temporary duration of the change; the few employees who were affected relative to the total number of employees represented in the consolidated unit; and the absence of any demonstrated bargaining history or past practice according to which the parties have handled similar changes in the past." See DHHS, id. at 830.

Applying the same criteria as in *DHHS*, the Authority found a change to be more than *de minimis* in *Department of the Treasury, U.S. Customs Service* ("*Customs*"), 19 FLRA 1155 (1985) where a change ("Minimal Passenger Revenue Collection") resulted in the elimination of overtime for cashiers at approximately 25 airports and the actual loss of overtime earnings for such employees; had a reasonably foreseeable impact on unit employees in terms of potential reductions-in-force, reduction in overtime, classification changes and other changes in the assignment of work; was permanent and immediate; foreseeably impacted on the entire classification of cashiers throughout the agency; and created a new, nationwide policy concerning which the parties had not previously negotiated on a nationwide basis. See *Customs*, *id.* at 1158, relied upon by the General Counsel at page 20 of his brief.

The General Counsel distinguishes the decision upon which Respondent relies, and in which the Authority found the changes to be of a *de minimis* nature. See *U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri* ("*Army*"), 20 FLRA 117 (1985) and compare R. Br. 4-7, 10-11 with G.C. Br. 20-21. In *Army*, the activity relocated its Data Management and Record Service across the hall from the north side of the west end of the fourth floor to south side of the east end of the fourth floor. The original location contained 3100 square feet of space, multiple aisles between desks, windows and 42 light fixtures. The final location had 1550 square feet of space, a single aisle between desks, no windows and 27 light fixtures and was also closer to the ventilation system cold air return and had an increased noise level due to its proximity to another division. The Authority noted that "the work duties performed by the relocated unit employees were not affected in any way" and that the relocation "was of a limited nature inasmuch as it involved only the employees of one organizational entity relocating from one place to another on the same floor" (*id.* at 119-120). But for the reduction in office space, the Authority found the other changes to have been "minor in nature and more applicable to resolution through the negotiated grievance procedure" (*id.* at 120). The Authority also noted that, while the relocation was permanent, only 23 employees out of a unit of approximately 1500 were affected. And, finally, the Authority noted that there was no evidence of a past practice with respect to prior relocations of employees or with respect to other analogous changes in employees' working conditions.

The General Counsel also distinguishes, at page 21 of his brief, footnote 18, Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina (HUD), 20 FLRA 233 (1985) in which the Authority found de minimis a change that effected the reassignment of two unit employees out of a nationwide consolidated unit of approximately 200 professional or a nationwide consolidated unit of 8,000 nonprofessional employees -- both units being governed by one master collective bargaining agreement. (The record did not show to which unit the two reassigned employees belonged.) In reaching its conclusion, the Authority noted "particularly" that, although the duties of the two employees changed, their work location, pay, grade and promotion potential did not. (id. at 236) The Authority also noted "particularly" that the change, while permanent, affected only 2 unit employees out of a unit of either 200 or 8,000 (ibid). The reassignment was made "pursuant to a national field reorganization [announced in February 1983] and a reduction in staff [whereby] the Columbia Area Office was facing a loss of 17 employees" (HUD, id. at 234). Two days after this decision, the Authority ruled as de minimis a change at another area office of HUD, made pursuant to plans begun in July 1981 for restructuring the Loan Management Branch of its Washington, D.C., Area Office. The plans were implemented in October 1981. The Authority found this change also to be de minimis and noted "particularly that only three employees in a unit of either approximately 200 or 8,000 employees were assigned unspecified 'unclassified duties,' that the record fails to establish that any other unit employees were directly affected, and that the reorganization was of temporary direction." See U.S. Department of Housing and Urban Development, Washington, D.C., Area Office, 20 FLRA 374, 378 (1985).

The General Counsel, at page 22 of his brief, distinguishes United States Department of the Treasury, Internal Revenue Service, Chicago, Illinois ("IRS"), 20 FLRA 46 (1985), in which the Authority found de minimis a change whereby 2 employees (out of a section of 19 and in a unit of all professional and nonprofessional employees of the Respondent) were required to keep a log of their daily time changes in order to insure that they were properly utilizing their time. Prior to this change, all 19 employees in the section kept only monthly accounts of their time. In reaching its conclusion, the Authority noted "particularly the slight nature of the change and the small number of employees affected" (id. at 50). It also noted that the change was "indefinite," but "temporary" (id. at 49) and did not change the duties of the employees but provided only a more accurate method of recording their time use. The Authority also noted that there was no evidence that this requirement "would be applied on a wider scale or on a permanent basis, either within the [section at issue] or activity-wide" (id. at 50).

The General Counsel, at page 23 of his brief also distinguishes Veterans Administration Medical Center, Phoenix, Arizona ("VA"), 20 FLRA 399 (1985) in which the Authority found de minimis a change that involved the reassignment of one unit employee to different job duties and a different work schedule. The unit was part of nationwide consolidated unit of nonprofessional employees exclusively represented by AFGE, with no collective bargaining agreement then in effect for the consolidated unit. The reassigned employee suffered no change in grade, pay, number of hours per week, or benefits. While the new position requires the employee to rotate shifts and work on holidays, he will be required to work on only one holiday per year and will spend approximately 80 percent of his time on the same shifts. There was no evidence to show a past practice with regard to negotiations concerning an analogous change in the past.

The General Counsel, at page 23 of his brief, also distinguishes Federal Aviation Administration (FAA), 20 FLRA 430 (September 30, 1985) in which the Authority held de minimis a change in which one unit employee was reassigned from FAA's Bridgeport, West Virginia, facility to new duties at its Elkins and Ellinore, West Virginia, facilities. While the work station of the employee remained the same, the new assignment requires him to travel approximately three to five times a week. One-way travel from Bridgeport to Elkins is approximately 55 miles and from Bridgeport to Ellinore is approximately 42 miles. The employee was required to travel in a General Services Administration vehicle which he regarded as unsafe, but did not report. Prior to the new assignment, the employee had, occasionally, traveled from Bridgeport to Elkins and Ellinore. In reaching its conclusion the Authority noted "particularly that the change involved only the increased frequency in travel of one employee in a nationwide consolidated unit" (FAA, id. at 434). The nationwide bargaining unit was Professional Airways Systems Specialists/MEBA, AFL-CIO ("PASS"). Eleven days after this decision, the Authority held to be more than de minimis, the reassignment of two unit employees in FAA's Norfolk Sector, Field Office. See Department of Transportation, Federal Aviation Administration, Washington, D.C., 20 FLRA 474 (October 11, 1985), where one employee was transferred from Franklin to Norfolk, Virginia, thereby increasing his commute from three to five minutes to one and one-half hours. The other employee was transferred from Newport News to Norfolk, Virginia, thereby increasing his commute from thirty minutes to an hour. In this later FAA decision the Authority noted "particularly that the Respondent did not dispute the General Counsel's contention that the unilateral changes herein resulted in an adverse impact on unit employees which was more than de minimis" (id. at 477). The two employees belonged to the same nationwide bargaining unit of PASS as those involved in FAA, 20 FLRA 430, above discussed.

The General Counsel, at page 26 of his brief, also distinguishes Department of Transportation, Federal Aviation Administration, Washington, D.C. ("DOT"), 20 FLRA 481 (1985) in which the Authority held de minimis a change in which additional duties were assigned to unit employees classified as Electronic Technicians. The assignment was temporary and involved substantially the same type of duties always performed. No evidence was adduced to show that the newly assigned duties would change, to any measurable degree, the amount of time required by the employees to complete all their assigned duties; would require travel to locations other than where their regular duties were performed, or would demand experience or skills in excess of or different from those already possessed by Electronics Technicians. The change affected unit employees at only 2 facilities of a consolidated nationwide unit of approximately 8,000 nonprofessional employees. There was no evidence of any past practice or bargaining history which would indicate how the parties had handled analogous changes. In reaching its decision the Authority noted "particularly the relative small number of unit employees involved [only an unshown number at two facilities] as compared to the size of the bargaining unit, the routine nature of the duties assigned, and the temporary nature of the change." See DOT, id. at 484. The bargaining unit was again PASS's nationwide bargaining unit involved in the two above-discussed FAA cases.

Of interest are several other recent decisions in which the Authority has applied its de minimis criteria. In Bureau of Field Operations, Social Security Administration, San Francisco, California ("BFO"), 20 FLRA 80 (1985) the Authority held to be de minimis a change in the work assignments of two employees which could affect both promotional opportunities and retention, and thus be "significant in nature," but was of a "temporary nature" lasting only two months (id. at 82). The Authority noted "particularly the short duration of the temporary reassignment in duties, the very few employees affected by the change [at most four or five] relative to the total number of employees represented in the unit [95 others in the office involved, but a nationwide bargaining unit], and the absence of any demonstrated bargaining history or past practice according to which the parties have handled similar changes" (ibid).

In Federal Aviation Administration, Washington, D.C., 20 FLRA 112 (1985) the Authority held to be de minimis a change that resulted in the removal of one telephone from a field office. The Authority noted "particularly the limited nature of the change; the few [eight] employees affected relative to the total number in the nationwide unit; and the absence of any demonstrated bargaining history or past practice pursuant to which the parties have handled similar changes in the past" (id. at 115-116).

In Environmental Protection Agency and Environmental Protection Agency Region II, 20 FLRA 644 (1985), the Authority held to be de minimis a relocation of 12 employees, out of a nationwide bargaining unit, from one area of a floor about 50 feet across the hall to another area, a permanent and immediate change which resulted in less individual office and storage space in a noisier location, but the relocated employees remained in the same section and division and maintained their grade levels, pay rates and hours of work. The Authority noted "particularly the limited nature of the change, the small number of employees affected relative to the size of the bargaining unit, and the lack of any demonstrated bargaining history or past practice of handling similar or analogous change" (id. at 644).

In Department of the Treasury, Internal Revenue Service and its Cleveland, Ohio District Office, 20 FLRA 403 (1985) the Authority held to be de minimis a change which left unit employees in the same location but in a more cramped work space with a loss of individual desks. The Authority noted "particularly the slight nature of the change in working conditions other than those which were reasonably foreseeable as a result of the 1981 announcement, as to which the Union had opportunity to request bargaining; the few employees affected [1 of 3 offices in a district which is composed of 60 districts covered by the parties' national agreement] relative to the total number of employees represented in the nationwide consolidated unit; and the absence of a past practice concerning negotiations over analogous situations" (id. at 406).

The facts and circumstances of the instant case are now to be considered, using the criteria set by the Authority and as illuminated by their application to the above-discussed cases.

1. The nature of the change. The change in the work and break locations of the cardiology nurses did not affect any basic change in the nature of their duties. The change in work location did make the performance of their duty to make reports, charts and plans on patient care somewhat less convenient and efficient. Schedules, reports and records upon which the nurses rely in performing these duties are no longer available to them in their new work location (the conference room), but are scattered throughout the cardiology ward on three bulletin boards. Nor does the conference room provide as secure, quiet, and private a place to perform those duties which are of vital importance to the patient-care function of the nurses and the hospital.

The change in the break room made the cardiology nurses less readily available to their patients and unable to respond to calls for assistance, should any emergency arise in their absence. While the cardiology nurses on break are not held responsible by the hospital for unforeseen occurrences, their professional pride and concern for their patients nevertheless suffers when they must take a break under these circumstances. The reasonably foreseeable effect of this change is that the cardiology nurses will be less inclined to take the rest breaks to which they are entitled, and which are commonly accepted in industry as being of benefit to both employee and employer. Indeed, rest breaks of up to 20 minutes are regarded as compensable time under the Fair Labor Standards Act. See 29 CFR 785.18 and Mitchell v. Greinetz, 235 F.2d 621, 623-624 (C.A. 10, 1956). Thus, the cardiology ward as a whole (both nursing staff and patients) suffers to some degree from this foreseeable effect of the change in break room.

2. The temporary, recurring or permanent nature of the change. The change is permanent and could affect the cardiology nurses for at least 50 minutes of their working day (20 minutes of break time and 30 minutes to make report) plus an unidentified amount of time needed to make patient charts, care plans, and discharge plans.

3. The number of unit employees affected or foreseeably affected by the change. There are nine to ten cardiology nurses. In addition, there and 10 to 11 nurses on the B/C Wards, who must now share their break room with 9 to 10 cardiology nurses, and who also had to care for cardiology patients who were placed on their wards during a two-week period when the cardiology nurses used one of the cardiology patient rooms for their report and break room. The number of such patients placed on the B/C Wards was not established.

4. The size of the bargaining unit. Bargaining over changes that occur strictly within the Wadsworth hospital, as here, are bargained locally. Therefore, the bargaining unit appropriate to be considered here is the Wadsworth hospital, which employs 384 bargaining unit employees.

5. The extent to which the parties may have established, through negotiation or past practice, procedures and appropriate arrangements concerning analogous changes in the past. There was no evidence of record of the establishing of any such procedures and arrangements.

6. When would the implementation of the change involve or adversely affect unit employees. The affect was fully felt on June 17, 1985.

Considering the totality of the facts and circumstances presented on this record, I conclude that the Authority would classify the changes in work and break locations here at issue as of a de minimis nature, noting particularly that, at most, they affect 22 employees out of a unit of 384; involve only the location where the affected employees spend a relatively small percentage of their working time; do not involve a change in classification, duties, pay or promotion potential; and do not deprive them of a location in which to perform work and take breaks, only a less convenient and efficient one.

Accordingly, I conclude that the General Counsel has not established, by a preponderance of the evidence[8] that the violations alleged in the complaint have occurred.

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[8] This is the statutory burden of proof. See 5 U.S.C. SS 7118(7) and (8).

Ultimate Findings and Recommended Order

Respondent has not committed the unfair labor practices alleged in the complaint.

The complaint therefore should be and hereby is DISMISSED.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: February 6, 1986
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION

Respondent

and Case No. 2-CA-40440

NATIONAL COUNCIL OF FIELD LABOR
LOCALS, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 644
AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the Charging Party (the Union) and by the General Counsel. The Respondent filed replies to the Charging Party's and the General Counsel's exceptions. The complaint alleged that the Respondent changed a past practice and policy affecting unit employees by assigning certain Industrial Hygienists (IH) to perform administrative duties in the Philadelphia Area Office (PAO) for scheduled 30-day periods without notifying the Union and bargaining with it over the impact and implementation of the change, thereby violating section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute).

II. Background

The Union is the exclusive representative of a nationwide unit of employees, including those in the PAO. At the time of the hearing, there were, among other employees, nine nonsupervisory IHs in the PAO--four GS-12s and five GS-11s, and two IH supervisors, including Eduardas Skladaitis. The IHs' duties involve conducting industrial hygiene inspections in a variety of work places to determine compliance with the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651, et seq. Sometime in June 1984, Skladaitis met with the four GS-12 IHs and informed them that the office administrative duties had grown to a point that he could no longer handle them alone; and that each would be assigned to the office to assist him with such duties for 30-day periods on a rotating basis. He then discussed such duties; requested the employees to select the months which they preferred to perform them; and stated that he would schedule each employee for two rotations initially and at the end of the eight-month period he would set up another schedule.

Shortly thereafter, the four IHs were given copies of a June 7, 1984 memorandum which described the duties to be performed during the assignment, including the supervisor's expectations with respect to the employees' processing of their regular inspection work. The assignments began on June 11, 1984 and ended around December 1984 when a second IH supervisor was hired. Most of the IHs were rotated only once and some did not serve an entire 30-day rotation. The Union was not notified of these assignments, and learned of them after the implementation date.

III. Judge's Decision

The Judge found that the assignments constituted a change in past practice and policy concerning the performance of administrative duties since some of the required duties had never been performed by the four IHs; others had been performed infrequently; and the employees had never been required to spend such an extended period performing duties not directly related to the investigation of their assigned cases. The Judge also noted areas where the Union identified potential adverse impact.

The Judge applied the factors set out in Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA No. 101 (1985) and concluded that the impact or reasonably foreseeable impact of the change on the unit employees was no more than de minimis. In so concluding, he noted that the assignments did not change the employees' normal duties, office location, space, hours, or benefits; were made to cover growing administrative duties in the PAO; were not permanent; and affected only four employees in a nationwide unit. He further noted that it was not clear from the record that similar changes were ever negotiated at the area office level.

IV. Positions of the Parties

The General Counsel disagrees with the Judge's conclusion and contends that the evidence and the Judge's findings of fact compel the conclusion that the reasonably foreseeable impact of the change on the unit employees' conditions of employment was more than *de minimis*. The Union essentially contends that the *de minimis* test applied by the Judge is inconsistent with the Statute and its legislative history, and therefore, requests the Authority to reconsider that test. Alternatively, it requests the Authority to adopt a "demonstrable present or future impact" test. The Union argues that the change in this case had an "extensive demonstrable effect on unit employees," as well as a "foreseeably demonstrable effect"; therefore, the Respondent's action constitutes a violation requiring, among other things, a *status quo ante* remedy.

The Respondent supports the Judge's Decision. It further argues, with regard to the General Counsel's contention, that even assuming the Authority found that the change was more than *de minimis* at the time it was instituted, the complaint should be dismissed because (1) the rotations were terminated prior to the hearing, (2) nc adverse impact resulted, and (3) the subjects the Union would have negotiated (leave, training, and the impact on performance evaluations) were covered by the parties' national agreement.

V. Analysis

In *Department of Health and Human Services, Social Security Administration*, 24 FLRA No. 42 (1986), we reassessed and modified the *de minimis* standard previously used to identify changes in conditions of employment which require bargaining. We stated that in order to determine whether a change in conditions of employment requires bargaining, we would carefully examine the pertinent facts and circumstances presented in each case; and that in examining the record, principal emphasis would be placed on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment. We also stated that equitable considerations would be taken into account in balancing the various interests involved; that the number of affected employees and the parties' bargaining history would be given limited application; and that the size of the bargaining unit would no longer be applied.

Applying the revised standard to this case, we find based on the facts and circumstances that the nature and extent of the change gave rise to a duty to bargain. In this regard we note that the duration of the change was initially indefinite; that the change required the employees to perform new duties, and others which they had performed only on an infrequent basis; and that it required the employees to spend an extended period, which had never been required before, performing functions not directly related to their case investigations. We also note, as found by the Judge, that the Union identified areas of potential adverse effect involving training, leave, and promotional opportunities, and was concerned that the change could decrease the time for employees to accomplish their normal inspection duties. The Union also argued that the change could cause employees to miss their assigned due dates, and would interfere with their timely writing of inspection reports which could affect their performance evaluations. In view of these circumstances, the assignment of administrative duties in this case resulted in an obligation to bargain. Further, noting that the Union was not notified of the change and that there is no evidence to show that it clearly and unmistakably waived its right to negotiate over the impact and implementation of such change, we find no merit to the Respondent's contention that the complaint should be dismissed because certain matters that the Union would have negotiated were covered by the parties' national agreement.

Therefore, we find that the Respondent violated section 7116(a)(1) and (5) of the Statute, as alleged.

VI. Remedy

The Union requests a status quo ante order to remedy the unfair labor practices by the Respondent. We conclude that such a remedy is not warranted in the circumstances of this case where the evidence shows that the assignments were discontinued prior to the hearing in this case. Thus, in these circumstances where a status quo ante remedy would be meaningless, a prospective bargaining order should fully remedy the refusal to bargain violations.*/ See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 17 FLRA 594 (1985).

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*/ In view of this conclusion, it is unnecessary to apply an analysis of the factors enumerated in Federal Correctional Institution, 8 FLRA 604 (1982).

VII. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record, including the parties' contentions, and adopts the Judge's findings and conclusions only to the extent consistent with our decision above.

ORDER

Pursuant to Section 2423.29 of the Authority's Rules and Regulations and Section 7118 of the Statute, it is hereby ordered that the Department of Labor, Occupational Safety and Health Administration:

1. Cease and desist from:

(a) Implementing a change in the working conditions of its employees in the Philadelphia Area Office concerning the assignment of administrative duties without first notifying the National Council of Field Labor Locals, American Federation of Government Employees, Local 644, AFL-CIO, the employees' exclusive bargaining representative, and affording it an opportunity to negotiate with respect to the procedures to be observed in implementing such changes and concerning appropriate arrangements for employees adversely affected thereby.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain with the National Council of Field Labor Locals, American Federation of Government Employees, Local 644, AFL-CIO, the employees' exclusive bargaining representative, with respect to procedures and appropriate arrangements for employees adversely affected by the implementation of the change concerning the assignment of administrative duties.

(b) Post at its Philadelphia Area Office copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Area Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places where Notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C. December 22, 1986

J. C. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement a change in the working conditions of our employees in the Philadelphia Area Office concerning the assignment of administrative duties without first affording the National Council of Field Labor Locals, American Federation of Government Employees, Local 644, AFL-CIO, the employees' exclusive bargaining representative, an opportunity to negotiate with respect to the procedures to be observed in implementing such change and concerning appropriate arrangements for employees adversely affected thereby.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, bargain with the National Council of Field Labor Locals, American Federation Federation of Government Employees, Local 644, AFL-CIO, our employees' exclusive bargaining representative, with respect to procedures and appropriate arrangements for employees adversely affected by the implementation of the change concerning the assignment of administrative duties.

____
(Activity)

Dated: ____________ By: _____________________________
Philadelphia Area Director

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 3700, New York, NY 10278, and whose telephone number is: (212) 264-4934.

(24 FLRA No. 74)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

U.S. DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION

Respondent

and

Case No.: 2-CA-40440

NATIONAL COUNCIL OF FIELD LABOR
LOCALS, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 644
AFL-CIO

Charging Party

. . . .

Barbara S. Liggett, Esquire
For the General Counsel

Mark Maxin, Esquire
For the Respondent

Before: ELI NASH, Jr.
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on October 31, 1984 by the Regional Director for the Federal Labor Relations Authority, New York, New York, a hearing was held before the undersigned on February 19, 1985.

This proceeding arose under the Federal Service Labor-Management Relations Statute (herein called the Statute). It resulted from a charge filed on August 1, 1984 by the National Council of Field Labor Locals, American Federation of Government Employees, Local 644, AFL-CIO (herein called the Union) against U.S. Department of Labor, Occupational Safety and Health Administration (herein called the Respondent).

The Complaint alleges that the agency violated sections 7116(a)(1) and (5) of the Statute by changing a past practice and policy affecting bargaining unit employees by assigning GS-12 Industrial Hygienists to perform administrative duties in its Philadelphia Area Office for scheduled 30-day periods.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

The Union is the exclusive representative of a nationwide unit of employees, including employees of its Respondent's Philadelphia Area Office. The Charging Party is a constituent local of the Union. A collective bargaining agreement, effective August 17, 1978, is currently in effect between the Union and Respondent.

The Philadelphia Area Office supervisory staff is headed by Area Director Bernard Dillon and five supervisors in 3 different areas: two industrial hygienist supervisors, two safety supervisors, and an office management supervisor who is responsible for the clerical staff and who report to Dillon. Eduardas Skladaitis and Chris Komis are the industrial hygienists supervision. In addition to the supervisors there were at the time of the hearing nine nonsupervisory industrial hygienists in the office: four GS-12's and five GS-11's.

Sometime in early June 1984, Skladaitis called a meeting of the four GS-12 industrial hygienists in the office and informed them that the office administrative duties had grown to a point where he could no longer handle all the duties alone. Skladaitis told the GS-12's that they would be assigned, on a rotating basis, to be in the office for 30-day periods to assist him in performing these various administrative duties. Skladaitis then discussed, in general terms, the administrative functions he was assigning to them. Skladaitis requested that the employees select the months which they preferred to perform their administrative assignments, and said that he would schedule two rotations for the time being, and then at the conclusion of the eight month period, set up the schedule again.

Shortly thereafter, probably a day or two after the meeting, the four were given copies of a memorandum dated June 7, 1984, which established precise duties to be performed during the administrative assignments to the office including, Skladaitis' expectations with respect to the employees' processing of their regular inspection work. The memorandum stated in part that,

> [n]o field work will be required during these periods unless an emergency situation should occur. You are expected to review your open assignments prior to these periods to ensure that any necessary field work is performed before your assignment to the office.

The memorandum also provided that "[a]s time permits, you should also work on open case files requiring no field activity." It also provided that the GS-12 assigned to the office would serve as an acting supervisor in Skladaitis' absence.

The assignments by Skladaitis which were reaffirmed in his June 7, 1984 memorandum, constituted a change in past practice and policy concerning the performance of administrative duties since some of the required duties had never been performed by the four GS-12 industrial hygienists.[1] Other duties had been performed only on an infrequent basis, at Skladaitis' request. In addition, the GS-12's had never been required to spend such an extended period of time performing functions not directly related to the investigation of the case assigned to them. However, the sole administrative duty that none of the 4 had performed was tracking which involved following the development of a case to determine its status until final abatement is reached. This involved no more than 5 to 10 percent of the duties to be performed during rotation. Thus, the testimony of two industrial hygienists Barry Scott and Pauline Caraher was that they had not performed certain duties listed in the June 7 memorandum.

On June 11, 1984 Respondent started the administrative assignment rotations. The evidence reveals that the Union was not notified of these administrative assignments. Union President Richard Clougherty, who is one of the Union officials designated to received notice of change in the Philadelphia Area Office, learned of the change in administrative assignments in the Philadelphia office only after the implementation date of the change. Then he learned of the changes only when another Union officer, James Weyrauch, telephoned Clougherty to inquire whether the Union had been notified of changes affecting Philadelphia industrial hygienists.

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[1] Skladaitis and Dillon testified that the GS-12's had previously performed all of the listed administrative duties when serving as acting supervisor. Skladaitis admitted however, that he knew training was necessary before employees could be expected to perform the duties listed in his June 7, 1984 memorandum. Skladaitis further admitted that the most extended period of time for which an employee had ever been assigned as acting supervisor was from several days to a week. He further acknowledged that an employee serving as acting supervisor would not be expected to perform the full range of supervisory duties.

Weyrauch had himself learned of the administrative duty change from the affected GS-12's, who showed him copies of the June 7, 1984 memorandum and wanted to know if the Union was aware of the change. After speaking with Weyrauch and reviewing a copy of the June 7, 1984 memorandum, Clougherty determined that the change in assignments announced by Skladaitis was likely to have an adverse impact on the affected employees, and filed the instant unfair labor practice charge.

The administrative duty rotations ended around December 1984 because a second industrial hygienist supervisor had been selected, thereby, eliminating Skladaitas' problems. Consequently, most of the industrial hygienists were rotated only once and even then some did not serve an entire 30-day rotation.

The Union apparently foresaw a number of areas of potential adverse impact. The 30-day rotation among only four employees it felt would result in employees spending 90 days per year on administrative duties, thereby, eliminating a significant portion of the time which had been available to GS-12's to accomplish their normal inspection duties. The Union's concern was that while the performance of administrative duties is an element of the performance standards for the affected employees, it is a non-critical element. The Union also was concerned that employee evaluations might be negatively affected by the decrease in inspections which appeared to be an unavoidable consequence of spending so much time on non-inspection duties. While employees do not have individual quotas for numbers of inspections they are required to complete in a year, the Philadelphia office does have such a quota, of which employees are constantly reminded throughout the year. In addition, Respondent publishes a newsletter giving an average number of inspections per industrial hygienist on both a region-wide and nation-wide basis. The Union feared, based on past experience, that if the office did not meet its goals, management would look for employees who had not contributed the necessary number of inspections. The Union also felt that the decrease in numbers of inspections performed could affect employees' performance evaluations because the standards allow for only one report with deficiencies per twenty-five consecutive inspections. Thus, the Union feared that as the number of inspections decreased, employees would be penalized disproportionately for errors.

In addition to the adverse impact anticipated as a result of the decreased amount of time available for inspection activities, the Union anticipated adverse impact from confining employees to the office for the extended 30-day periods. In this regard, a critical element of the GS-12 performance standards is "Time Utilization." Here each case assigned to an industrial hygienist is given a due date by Skladaitis. The "Time Utilization" element allows for only five missed due dates per evaluation period. The concern here being that employees serving their 30-day administrative assignments would be unable to complete the work necessary to submit their cases to Skladaitis for review by the due dates. There was no apparent modification of due dates as a result of the assignment of the administrative duties. Contrariwise, the language of the June 7, 1984 memorandum is that employees were to plan their field work so that inspections were completed prior to the administrative assignments, and report writing could be done during the assignments "as time permits." Although all witnesses testified that the administrative duties were in fact too extensive to allow for time to write up inspection reports, this statement in the June 7, 1984 memorandum raised a possibility that employees would be held accountable for completion of their open inspection cases while juggling new administrative duties. Apparently, Skladaitis sought to dispel any adverse consequences for assuming such administrative duties by talking to hygienists such as Caraher. However, no assurances were given in writing. In addition, Article 43, Section 12 of the parties' collective bargaining agreement seemingly requires that performance appraisals make allowance for factors beyond the control of the employee.

Besides these concerns the Union saw an impact of the 30-day assignments on the critical element of "Time Utilization" as an increase in the average report preparation time compared to the average on-site inspection time. Therefore, if an employee completed an on-site inspection and then began serving a 30-day administrative assignment during which he or she was forced to put the inspection aside and attend to other duties, the eventual report writing time would be longer than if that employee had been allowed to write up the case immediately after completion of the inspection, thereby preventing the employee from meeting that critical element.

Finally concern about training; the impact of the 30-day assignments on annual leave schedules or sick and emergency leave; and a concern that the rumored second supervisory industrial hygienist position would be announced and filled before all GS-12's had an opportunity to serve in this administrative function, giving an advantage in the category of experience to the GS-12's who had completed the earlier rotations.

Discussion and Conclusions

Respondent's principal defense in this matter is that the impact of the assignment of administrative duties herein was *de minimis*. In a spate of cases since the hearing in this matter, the Authority has dealt with the question of whether a duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than *de minimis*. See *Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois*, 19 FLRA No. 101, 19 FLRA 827 (1985); *Department of the Treasury, U.S. Customs Service*, 19 FLRA No. 128, 19 FLRA 1155 (1985); *United States Department of the Treasury, Internal Revenue Service, Chicago, Illinois*, 20 FLRA No. 6, 20 FLRA 46 (1985); *Bureau of Field Operations, Social Security Administration, San Francisco, California*, 20 FLRA No. 9, 20 FLRA 80 (1985); *Federal Aviation Administration, Washington, D.C.*; 20 FLRA No. 11, 20 FLRA 112 (1985); *Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina*, 20 FLRA No. 31, 20 FLRA 233 (1985); *U.S. Department of Housing and Urban Development,* Washington, D.C. Area Office, 20 FLRA No. 38, 20 FLRA 374 (1985); Federal Aviation Administration, 20 FLRA No. 45, 20 FLRA 430 (1985); Department of Transportation, Federal Aviation Administration, Washington, D.C., 20 FLRA No. 52, 20 FLRA 474 (1985); Environmental Protection Agency and Environmental Protection Agency, Region II, 20 FLRA No. 76, 20 FLRA 644 (1985).

In the above cases the Authority set out 5 factors it would use in determining whether a change was more than de minimis. Those factors are: the extent of the change in work duties, location, office space, hours, loss of benefits or wages and the like; the temporary, recurring or permanent nature of the change; the number of employees affected or foreseeably affected by the change; the size of the bargaining unit; and the extent to which the parties may have established, through negotiations or past practice, procedures and appropriate arrangements concerning analogous changes in the past. The Authority also noted that a determination as to whether the exercise of a management right under section 7106(a) of the Statute gives rise to a duty to bargain under section 7106(b)(2) and (3) will not necessarily require in every case a determination or to whether the exercise of the management right results in a change in a condition of employment having an impact on bargaining unit employees which is more than de minimis, especially where there is no indication that the nature and degree of impact is at issue in the case. Here Respondent exercised a management right when it assigned administrative work to the GS-12's on a temporary basis. Therefore, the nature and degree of impact must be considered under criteria established by the Authority.[2]

In all the circumstances of this case, applying the suggested factors it must be found that the impact or reasonably foreseeable impact on conditions of employment of unit employees caused by requiring four unit employees to perform administrative and supervisory duties assigned to them was no more than de minimis. It is noted that the administrative duties assigned to these employees did not change their normal duties of which they were basically relieved during the 30-day period in which they rotated into the administrative assignments. Nor did it change their location, office space, hours or benefits. In addition, the assignments were made to cover growing administrative duties in the Philadelphia Area Office for a temporary period. The duration of the change was brief, lasting approximately six months although initially it appeared that it would have been in effect for a much longer period of time. However, there is no indication from the record that the change was ever intended to be permanent. It appears that, at best, the assignment of administrative duties was only intended to last until a new supervisory employee was selected. As to the number of employees affected and the size of the bargaining unit, only four employees in a nationwide unit, which included many industrial hygienists, were required to perform these administrative duties on a rotating basis. Furthermore, there is no evidence to indicate that these administrative assignments would have been required on a wider scale or on a permanent basis, either among Skladaitis' employees or other employees activity wide. Finally, it is not clear from the record that analogous changes were ever negotiated at the area office level.

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[2] Member McGinnis, in a separate concurring opinion would have, in addition to the listed factors, utilize a sixth factor in determining de minimis issues.

Based on the foregoing, and noting the slight nature of the change and the small number of employees affected, it is found that the impact or the reasonably foreseeable impact of the change on unit employees' conditions of employment in this matter was no more than de minimis. Accordingly, it is found that Respondent was under no obligation to notify the Union and afford it an opportunity to request bargaining pursuant to section 7106(b)(2) and (3) of the Statute. It is therefore, recommended that the Authority adopt the following:

ORDER

IT IS ORDERED that the Complaint in Case No. 2-CA-40440 be, and it hereby is, dismissed.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: January 22, 1986
Washington, D.C.

24 FLRA No. 75

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
MEDICAL CENTER
PHOENIX, ARIZONA

Respondent

and

Case No. 8-CA-50153

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2382, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices as alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent and the General Counsel filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Agency's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.*/ Upon consideration of the Judge's Decision, the exceptions, and the entire record, the Authority hereby adopts the Judge's findings, conclusions, and recommended order.

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*/ We agree with the Judge's ruling to reject the Respondent's offer of a written statement by a former employee whom it did not call as a witness, because it presented no opportunity to cross examine the witness, and there was no showing that the witness, who had taken a job at a Veterans Administration facility in Texas, was unavailable at the time of the hearing.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Veterans Administration Medical Center, Phoenix, Arizona shall:

1. Cease and desist from:

(a) Unilaterally discontinuing the practice of permitting a Union Secretary duty time to work on labor-management relations matters at the Union office when it had agreed to such a lawful arrangement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its Phoenix, Arizona Medical Center copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C. December 22, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally discontinue the practice of permitting a Union Secretary duty time to work on labor-management relations matters at the Union office when we had agreed to such a lawful arrangement.

WE WILL NOT in like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

____
(Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII, Federal Labor Relations Authority, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is (213) 894-3805.

(24 FLRA No. 75)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

VETERANS ADMINISTRATION
MEDICAL CENTER
PHOENIX, ARIZONA

Respondent

and

Case No. 8-CA-50153

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2382, AFL-CIO

Charging Party

Gregory G. Ferris, Esq.
For the Respondent

Robert F. Johansson
For the Charging Party

Jonathan L. Levine, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq*.

Upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 2382, AFL-CIO (herein referred to as the Union) against Veterans Administration Medical Center, Phoenix, Arizona (herein referred to as Respondent), the General Counsel of the Authority, by the Acting Regional Director for Region VIII, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally changing a practice of permitting employees who occupied the position of Union Secretary to perform Union representational duties on official time.

A hearing on the Complaint was conducted in Phoenix, Arizona at which all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by counsel for Respondent and counsel for the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following findings of fact and conclusions of law.

At all times material herein the American Federation of Government Employees, AFL-CIO has represented various employees of the Veterans Administration including employees located at the Veterans Administration Medical Center in Phoenix, Arizona. Local 2382 provides direct representation for unit employees at the Phoenix facility, infra.

In April 1983 it came to the attention of Local 2382 President Robert Johansson that Ardis Haines, the Local Union Secretary, was unable to complete Union secretarial duties on off-duty time. Accordingly, Johansson met with Barbara Watkins, Chief of Dietetic Services at Respondent's Phoenix facility, and suggested that food service employee Haines be permitted to perform "mainly" labor-management secretarial work for the Union on duty time. According to Johansson,[1] Watkins agreed that when Haines had Union secretarial work to perform as described, she would request permission from her first line supervisor (a subordinate of Watkins) for release between the hours of 2:30 p.m. and 3:00 p.m. if her food service work was not required. Johansson told Haines of the agreement and explained that work during duty time in the Union office should be confined to appropriate labor-management related matters. Thereafter, according to Haines, who worked an 11:30 a.m. to 8:00 p.m. shift, she went to the Union office one to three days a week between the hours of 2:30 p.m. and 3:00 p.m.[2] While at the Union office during these times Haines typed various documents dealing with labor-management relations matters such as rough drafts of contract proposals, grievances and correspondence between the Union and Respondent's management personnel.

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[1] Watkins was not called as a witness.

[2] Haines testified she requested permission to leave from her two supervisors, Washington and Watley. Haines testified that she did not sign out when Washington, who was her supervisor the majority of times, was on duty. Washington was not called as a witness. Watley testified he was not aware of the Watkins-Johansson agreement or that Haines was away from her job on Union business on a regular basis. An employee "sign-out" sheet for Union business does not reflect Haines regularly leaving her job. However, Haines and Watley both testified that Watley insisted on Haines signing out but she did not always comply. From the testimony and exhibits it is apparent that Haines resisted the sign out requirement and it was a continuing source of controversy between Haines and Watley. In any event, I credit Johansson and Haines regarding the establishment and subsequent practice of Haines going to the Union office on duty time.

In January 1984, Sandra Candell succeeded Haines as Union Secretary. Candell was a Medical Clerk-Typist in Respondent's Dialysis Unit under the direct supervision of Dr. Navin K. Sharma, Chief of the Nephrology Section. Accordingly, Union President Johansson met with Sharma and informed him of Candell's Union position and related that the prior Union Secretary had performed work for the Union during duty time and he would like to "negotiate"[3/] with him as to the duty time hours Candell would be able to work for the Union. Sharma indicated he would attempt to work out a suitable agreement with Johansson so Candell could work for the Union as Secretary during duty hours without infringing on her duties for the Nephrology Section. Johansson requested that Candell be permitted to go to the Union office each Monday, Wednesday and Friday from 7:30 a.m. to 8:30 a.m. and for one-half hour on Tuesdays and Thursdays. Shortly thereafter, according to Sharma, he informed Candell she could go to the Union office on Mondays, Wednesdays and Fridays from 7:30 a.m. to 8:30 a.m. but release from work on Tuesdays and Thursdays would be left for further discussion.[4/] Accordingly, Candell thereupon went to the Union office almost every Monday, Wednesday and Friday between 7:30 a.m. and 8:30 a.m. and typed memoranda and letters for Union officials to management, proposals for contract negotiations and grievances.[5/] Candell estimated that while 80 percent of her time was spent typing such materials, she also typed "minutes of meetings" during duty hours.[6/]

Sometime in August or early September 1984 Candell attended a training session and while reporting this time as administrative leave to Jerry Congelton, the Secretary for Medical Services at the facility, a question arose as to whether Candell's duty time spent in the Union office should also be reported as administrative leave. Congelton said she'd look into the matter and shortly thereafter, Dr. Sharma was informed by Martin Lieberman, Respondent's Assistant Personnel Officer, he could not grant Candell permission to use duty time for Union business but that Sharma

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[3/] The word used by Sharma in relating this conversation.

[4/] Candell testified that Sharma told her she would be permitted to go to the Union office on Tuesdays and Thursdays as well. However, I credit Sharma's recollection of this conversation.

[5/] Candell testified that she also performed typing for the Union on off-duty hours.

[6/] I assume "minutes of meetings" refers to minutes of Union membership meetings.

could grant Candell annual leave for that purpose.[7] Sharma notified Candell of this around the middle of October 1984 and Candell ceased going to the Union office on duty time. In March 1985 Candell ceased employment with Respondent her office as Union Secretary.

Counsel for the General Counsel contends that by virtue of an explicit agreement between Union President Johansson and Respondent's supervisors Watkins and Sharma, the existence of a practice was established whereby the occupant of the position of Union Secretary was permitted to work in the Union office during regular duty hours. That practice continued from April 1983 until unilaterally terminated in October 1984.

Respondent argues that under the circumstances herein no practice cognizable under the Statute was established. Respondent further argues that the performance of Union secretarial work during duty time is contrary to the proscription of section 7131(b) of the Statute. Respondent further contends that provisions found in the parties' collective bargaining agreements preclude the use of Union secretarial personnel for such work during duty time.

The Practice

The facts herein establish that through a verbal agreement between supervisor Watkins and Union President Johansson in April 1983, Union Secretary Haines was permitted to perform Union secretarial work, supra, on duty time. Thereafter, pursuant to that agreement Haines followed the practice of going to the Union office to perform such duties for one-half hour one to three days a week until January 1984. When Sandra Candell succeeded Haines as Union Secretary in January 1984, Candell's supervisor, Dr. Sharma, after being informed by Johansson of the prior arrangement, agreed that Candell could go to the Union office from 7:30 a.m. to 8:30 a.m. on Mondays, Wednesdays and Fridays. Thereafter, until October 1984, Candell followed the practice of going to the Union office during the allowed duty time to perform Union secretarial duties pursuant to Johansson's request and Sharma's agreement to accede to the request. Thus, in my view a practice was established whereby following acquiescence by the individual employee's supervisor, Union Secretary Candell was permitted to perform Union secretarial duties on official time.

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[7] Lieberman testified that he told Sharma it was "inappropriate" to permit Candell use of duty time for this purpose. Lieberman further testified that he had previously been unaware of the arrangement and, in coming to his conclusion, he relied on Article 8, Section 5 of the Master Agreement between the Veterans Administration and the American Federation of Government Employees which states, infra: "Official time for local union officers and/or stewards will be a proper subject for local supplemental bargaining." Lieberman saw the matter as negotiable between the Union and a "responsible" management official.

However, I do not find that a practice of allowing any employee who serves as Union Secretary to perform such duties on official time was established. Before either Secretary Haines or Candell used duty time to work on Union matters, Johansson sought and obtained the agreement of each of their supervisors separately and such agreement extended only to the employee within each supervisor's control. Further, there was no evidence that either supervisor Watkins or Sharma was authorized to bind the entire facility regarding employees outside of their immediate supervision or held such positions in Respondent's chain of command where such authority could be inferred. Nor has it been established that any similar general practice regarding other Union officers existed. Thus, although Assistant Personnel Officer Lieberman testified that when the Union previously desired official time to engage in Union activities the Union made a request to Respondent's Director in writing through the Chief of Personnel, Union President Johansson testified that while the Union did follow the practice of making a request through Personnel Services for administrative time for Union related training, such as steward training, when he took office in 1979 he orally requested and was granted from his Service Chief (supervisor) an average of three hours a day duty time to engage in Union duties, following the same procedure used by the previous Union President to obtain official time for conducting Union duties. The record discloses no other similar situations. The most that might be concluded herein is that when the Union desired duty time for work or labor-management matters, the Union followed the practice of requesting such from the Union official's supervisor on a case by case basis.

It has been long held that a term and condition of employment may be established if a practice is consistently exercised for an extended period of time with the knowledge and consent of Respondent's supervisors. See Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA 413 (1980); Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 5 FLRA 352 (1981); and U.S. Immigration and Naturalization Service, 16 FLRA 1007 (1984). Respondent argues that the alleged practice did not occur with the full knowledge and consent of both parties and with such frequency over a sufficiently long period of time that a reasonable person would expect it to continue. Respondent suggests, rather, that what occurred was a "somewhat clandestine attempt to establish a practice behind responsible Management's back." In this regard Respondent further contends that Sharma "should not be considered informed, responsible management. . . ."

I reject Respondent's contentions. The practice found herein followed an express agreement between Dr. Sharma and President Johansson after Sharma was advised of the prior Union Secretary having been permitted duty time to perform Union work by her supervisor. As found herein, the evidence did not disclose that Johansson made any misrepresentation to Sharma in this regard. Thereupon, Candell openly went to the Union office regularly three days a week for an hour each time for about nine months. Further, if Respondent wished to limit the ostensible authority of Sharma regarding the activities of employees under his supervision,[8] it should have so informed him of its wishes when training or instructing supervisors on the extent of their authority. If Sharma was inexperienced or "uncomfortable" in dealing with labor-management relations matters, he was free to seek advice before acting.

The Proscription of section 7131(b)

Section 7131(b) of the Statute provides:

> "(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status."

In American Federation of Government Employees, AFL-CIO, Local 2823 and Veterans Administration Regional Office, Cleveland, Ohio, 2 FLRA 4 (1979), the Authority "closely examined" the meaning and purpose of section 7131(b) of the Statute. In that case, after reviewing the specific language and legislative history of section 7131(b), the Authority concluded that to be an activity related to the internal business of a labor organization within the meaning of section 7131(b) that activity must be solely related to the internal structure and institution of a labor organization. In coming to its conclusion the Authority, in part, relied upon the legislative history of the Statute[9] which stated that the language found in section 7131(b) proscribing the use of duty time by employees for activities relating to internal business of a labor organization did not apply to activities of labor organizations which involved an "interface" with management such as negotiations, grievances, negotiability disputes, and unfair labor practices nor the preparation for such activities. In subsequent cases the proscriptions found in section 7131(b) has been narrowly construed by the Authority. See American Federation of Government Employees, AFL-CIO, Local 1692 and Headquarters, 323rd Flying Training Wing (ATC), Mather Air Force Base, California, 3 FLRA 305 (1980); National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 6 FLRA 508 at 518-520 (1981); and National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, Corps of Engineers, Kansas City, Missouri, 11 FLRA 7 (1983).

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[8] Respondent's Answer to the Complaint herein admits that Sharma was a supervisor within the meaning of section 7103(a)(10) of the Statute and a management official within the meaning of section 7103(a)(11) of the Statute.

[9] 124 Cong. Rec. H 9638 (daily ed. Sept. 13, 1978).

In the case herein the record reveals that Candell spent approximately 80 percent of her time typing correspondence from the Union to management, contract proposals and counterproposals, grievances and letters concerning grievances. In my view Candell's typing such documents was an activity involving the Union's "interface" with management and not solely related to the internal structure and institution of the Union. Accordingly, I conclude such conduct was not contrary to the proscription of section 7131(b) of the Statute and I reject Respondent's contention with regard thereto.

The Collective Bargaining Agreements

Respondent contends that the parties' Master Agreement and local agreement "clearly" preclude the Union from permitting the Union Secretary access to the Union office during duty time.

On June 12, 1979 the American Federation of Government Employees (AFGE) was certified as the exclusive representative of a national consolidated unit of various Veterans Administration employees including non-supervisory, non-professional employees (with some exceptions) at the Phoenix, Arizona facility. Apparently Local 2382 had represented employees at that facility since 1972 and after AFGE and the Veterans Administration executed a Master Agreement in August 1982, a local agreement between Local 2382 and Veterans Administration, Phoenix in existence since 1972 continued in effect as a supplemental agreement between the parties.

Article 8, Section 5 of the Master Agreement provides:

> "Section 5 - Official time for local union officers and/or stewards will be a proper subject for local supplemental bargaining."

Article XIV, Section 5 of the local agreement, after making provisions for Union office space on Respondent's premises, states:

> "A Union representative who is off duty during daytime hours may staff the office during hours set by the Union. The office space may be used to house Union records, material and equipment. It may also be used by Union representatives when specifically authorized official time to prepare a case when representing employees at hearings. Official time may not be authorized for the daily staffing of the Union office."

Further, section 7131(d) of the Statute provides:

> "(d) Except as provided in the preceding subsections of this section --

> "(1) any employee representing an exclusive representative, or
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> "(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,
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> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest."

Respondent argues the Master Agreement envisioned bargaining on official time for Local Union officers would occur at the local level and indeed, the local agreement specifically addresses the matter of official time thereby precluding the establishment of a practice concerning official time for Union representatives which goes beyond the terms of the existing agreement. To support this argument Respondent notes that in August 1984 the Union submitted a written contract proposal to Respondent which would amend the local agreement by explicitly authorizing the Union Secretary three hours a day duty time to engage in Union secretarial duties.[10]

Clearly under section 7131(d) of the Statute the amount of official time granted to a Union representative is a negotiable matter. While Article XIV, Section 5 of the local agreement provides that the Union office may be used by Union representatives when specifically authorized official time to prepare a case for a hearing, the article does not indicate that the parties may not extend its terms by agreement by responsible Union officials and supervisors on a case by case basis. Further, no evidence was submitted to explain the meaning of the terms "staff" or "staffing" of the Union office as used in that Article.

In order to constitute a waiver of a bargainable right, such waiver must be clear and unmistakable and consciously yielded. See Library of Congress, 9 FLRA 421 (1982) and Internal Revenue Service (District, Region, National Office Units), 16 FLRA 904 (1984) and cases cited in fn. 21 at 922-923. No clear and unmistakable waiver of the right to bargain on the use of duty time to be granted a Union representative is present herein and therefor, the Union was free to obtain whatever official time for Candell's Union secretarial duties it could negotiate. Indeed, as stated supra, Candell's use of duty time to perform permissible Union secretarial duties was the product of an express agreement between the Union and an agent of management. Accordingly, in the circumstances herein, I reject Respondent's contentions that the collective bargaining agreements preclude Candell's use of duty time to work at the Union office.

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[10] The Union's proposal would also provide various amounts of official time to the Union's President, other officers and stewards. In my view, recourse to the Union's proposal is of no assistance in resolving the matter at issue herein.

In view of the entire foregoing I conclude Respondent, by unilaterally withdrawing permission allowing Union Secretary Candell use of duty time to work on Union matters as described herein to the extent such activities were not related to the internal structure and institution of the Union, violated sections 7116(a)(1) and (5) of the Statute and recommend the Authority issue the following Order. However, since I have concluded that the practice found herein followed from specific permission granted to Candell by her supervisor and such permission did not go beyond the particular agreement of the supervisor relative to the employee within his supervision, and Candell is no longer employed by Respondent, I shall not order that the practice be restored to the status quo ante.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Veterans Administration Medical Center, Phoenix, Arizona shall:

1. Cease and desist from:

(a) Unilaterally discontinuing the practice of permitting Union Secretary Sandra Candell duty time to work on labor-management relations matters each Monday, Wednesday and Friday from 7:30 a.m. to 8:30 a.m. at the Union office.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its Phoenix, Arizona Medical Center copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Salvatore J. Arrigo
SALVATORE J. ARRIGO
Administrative Law Judge

Dated: January 13, 1986
Washington, D.C.

(24 FLRA No. 75)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally discontinue the practices of permitting Union Secretary Sandra Candell duty time to work on labor-management relations matters each Monday, Wednesday and Friday from 7:30 a.m. to 8:30 a.m. at the Union office.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 688-3805.

*U.S. G.P.O. 1987-181-223:60002